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In the

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. 97, 98, 99

INTERSTATE COMMERCE COMMISSION, ET AL.,

APPELLANTS,

v.

BOSTON AND MAINE RAILROAD, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF ON BEHALF OF APPELLEES BOSTON AND MAINE RAILROAD, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (RICHARD JOYCE SMITH, WILLIAM J. KIRK, HARRY W. DORIGAN, TRUSTEES) AND MASSACHUSETTS PORT AUTHORITY

ROBERT G. BLEAKNEY, JR.
150 Causeway Street
Boston 14, Massachusetts
Counsel for the Railroad Appellees

HENRY E. FOLEY
10 Post Office Square
Boston 9, Massachusetts
Counsel for Massachusetts Port Authority

Of Counsel
NEAL HOLLAND
JAMES W. GRADY
THOMAS P. HACKETT

Of Counsel
CLARENCE I. PETERSON
HENRY P. MONAGHAN
FOLEY, HOAG & ELIOT

March 7, 1963

Blanchard Printing Company, Boston, Mass. — Law Printers

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Opinions Below

The opinion of the United States District Court for the District of Massachusetts (Woodbury, Sweeney and Ford,

J.J.) is officially reported at 202 F. Supp. 830 and is printed in the record at pages 3994 to 4005. The reports of the Interstate Commerce Commission (hereinafter referred to as "the Commission") in *Equalization of Rates at North Atlantic Ports*, dated December 5, 1960 and June 15, 1961, respectively, are officially reported at 341 I.C.C. 689 and 314 I.C.C. 185, and are printed in the record at pages 3738 to 3820 and pages 3836 to 3857.

Jurisdiction

The suit was brought in the District Court pursuant to 28 U.S.C. §§ 1336, 2284, and 2321 to 2325, and was heard before three judges, as required by 28 U.S.C. §2325. The judgment of the District Court was entered on February 23, 1962 (R. 4006), and various notices of appeal were filed on March 30, 1962. (R. 4007, 4020, 4024) The jurisdiction of this Court is conferred by 28 U.S.C. §§1253 and 2101(b); and on June 11, 1962 probable jurisdiction was noted and the appeals consolidated. (370 U.S. 914; R. 4027)

Questions Presented

The District Court set aside an order of the Commission which directed the cancellation of reduced rates proposed by railroads serving the Ports of New York, Boston, Albany and Portland (hereinafter sometimes referred to as "the northern tier carriers")[1] on export and import traffic moving between those ports and a defined interior territory.

[1] As used herein and by the Commission, the term "northern tier carriers" means those carriers serving directly or with their connections the Ports of New York, Boston, Albany and Portland, and the term "southern tier carriers" means those carriers serving directly or with their connections the Ports of Baltimore, Philadelphia and Hampton Roads. The term "Boston carriers" means the carriers serving Boston directly or with their connections.

the purpose of the rate reductions being to eliminate rate differentials maintained by the railroads serving Philadelphia, Baltimore and Hampton Roads (hereinafter sometimes referred to as the "southern tier carriers") on such traffic.

The questions presented on this appeal, so far as concerns the Boston carriers and Massachusetts Port Authority,[2] are: (1) whether the District Court correctly ruled that there is no warrant in law for the Commission's order insofar as it directed cancellation of the proposed differential-eliminating rates of the Boston carriers, and (2) whether the District Court properly ruled that this part of the Commission's order should be set aside and permanently enjoined rather than be remanded to the Commission.

Statement

This appeal arises from a suit brought by the Boston carriers to set aside an order of the Interstate Commerce Commission dated December 5, 1960. (R. 3821) That order, based upon an accompanying Report,[3] directed the cancellation of rates which had been voluntarily published by the Boston carriers and which are applicable to the movement of export and import traffic between the north central part of the United States (described in the Commission's Report and hereinafter referred to as "Affected

[2] Massachusetts Port Authority was a party to the proceeding before the Commission (R. 3737), and, in accordance with leave granted, intervened in the District Court in support of the position of the Boston carriers. (R. 3871) It seeks here, as do the Boston carriers, affirmance of the order of the District Court setting aside the order of the Commission insofar as it directs cancellation of the proposed Boston parity rates.

[3] R. 3738-3820; 311 I.C.C. 689; and hereinafter referred to as the "Original Report".

Territory") [4] and the Ports of Boston, New York, Albany and Portland. The rates ordered to be cancelled are on a parity with corresponding rates maintained on like traffic moving between Affected Territory and the Ports of Baltimore and Hampton Roads. (R. 3739-40; 311 I.C.C. at 690)

At the present time, differentially lower rail rates are applicable to the movement of export and import traffic between Affected Territory and the Ports of Baltimore and Hampton Roads than are applicable to the movement of such traffic between Affected Territory and the Ports of Boston, New York and Albany and, in part, Portland.[5] Except with respect to first and second class import traffic (where the differential in favor of Baltimore is 8¢ per 100 lbs.) and except with respect to grain and flour (where the differential in favor of Baltimore and Hampton Roads is 1-1/2¢ and 2¢, respectively), the differential in favor of Baltimore and Hampton Roads is, in all instances, 3¢ per 100 lbs. (R. 3742-43; 311 I.C.C. at 692)

In an effort to put themselves in a position where they might have an opportunity effectively to compete for export and import traffic originating in or destined to Affected Territory, the carriers serving the Ports of Boston, New York, Albany and Portland published rates on a parity with those to and from Baltimore and Hampton Roads. Simultaneously, the carriers serving Baltimore and

[4] Affected Territory generally comprises the area on and north of the Ohio River, west of the Buffalo-Pittsburgh line and east of the Mississippi River. It is more specifically defined at pages 3740 and 3741 of the record, 311 I.C.C. at 691-92.

[5] The differential applies only to import traffic from the Port of Portland to Affected Territory. The Port of Hampton Roads generally has the benefit of the Baltimore differentials on traffic to and from that part of Affected Territory west of the Sandusky-Marietta line. (R. 3742-43; 311 I.C.C. at 692). Philadelphia also has lower rates to Affected Territory than has Boston. The Baltimore Hampton Roads rates are lower than Philadelphia's, however, and are the rates with which the Boston carriers propose to equalize their rates.

Hampton Roads and their connections published rates which, if permitted to become effective, would restore the present differential though, of course, on a lower rate level. These differential-restoring rates were intended to take effect *only* if the simultaneously published parity rates were permitted to stand. (R. 3740; 311 I.C.C. at 690)

Upon protests filed by the various carriers and by civic and port interests at the various ports, the Commission suspended both sets of rates—the parity rates and the differential-restoring rates—and instituted an Investigation and Suspension proceeding under Section 15(7) of the Act. Following hearings, it filed its Original Report, in which it found that the proposed parity rates

> "are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports *as a group* and in undue prejudice and disadvantage to the southern tier ports." (R. 3806-07; 311 I.C.C. at 741-742) (Emphasis supplied.)

and

> "We further find that the proposed rates of the protestant railroads (i.e. the southern carriers' differential-restoring rates) are not shown to be just and reasonable." (Ibid.) (Parenthetical phrase supplied.)

It thereupon directed cancellation of the proposed Boston rates, as well as the proposed parity rates to and from the Ports of New York, Albany and Portland, and also directed cancellation of the proposed retaliatory differential-restoring rates. (R. 3807, 3821)

No appeal was taken from that part of the Commission's

order which directed cancellation of the proposed southern tier rates. By a complaint filed in the District Court (R. 3823), the Boston carriers and the Massachusetts Port Authority did appeal, however, from that portion of the Commission's order directing cancellation of the Boston rates. Promptly after the commencement of the action, various other carriers, and commercial, civic and port interests were granted leave to intervene.[6]

The statutory defendant, the United States of America, in its answer to the original and intervening complaints, admitted that the Commission had erred in treating the proposed rates of the northern tier carriers as a *unit*, intended to take effect only if all were found to be lawful. Accordingly, the United States prayed that the Commission's orders be set aside. (R. 3834-35)

In light of the answer filed by the United States, the Commission on April 11, 1961 reopened the proceedings for reconsideration of the lawfulness of the proposed rates to and from *each* northern tier port. (R. 3835) The District Court proceedings were, of course, deferred pending such reconsideration.

On June 15, 1961, a sharply divided Commission[7] handed

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[6] The New York Central Railroad Company, The Delaware & Hudson Railroad Corporation, Canadian National Railway Company, The New York, New Haven & Hartford Railroad Company, Erie-Lackawanna Railroad Company and New York, Susquehanna & Western Railroad Company, pursuant to leave of Court, filed an intervening complaint asking that the order be set aside insofar as it directed cancellation of any of the proposed parity rates, including the rates to and from Boston. The Port of New York Authority together with the City and State of New York and various other New York civic and commercial organizations intervened in support of the intervening carriers' complaints. Carriers serving the Ports of Baltimore, Philadelphia and Hampton Roads, together with various civic and commercial interests at those ports, were permitted to become intervening defendants.

[7] Commissioners Webb and Tucker filed a vigorous dissent. Commissioner Freas refused to concur in the finding of undue preference and undue prejudice, and Commissioner Bush did not participate in the decision. (R. 3855, 3857; 314 I.C.C. at 199, 201)

down its Report on Reconsideration. (R. 3836; 314 I.C.C. at 185) In that report the Commission restated what it characterized as "the principal facts" recited in the Original Report; referred to the greater average distance between Affected Territory points and the northern tier ports than between the same points and Baltimore; cited some of its decisions involving complaints against, as distinguished from voluntary attempts by the carriers to change, the existing differential adjustments, and said:

> "Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of section 3(1) of the act. What has just been said applies also, in greater of less degree, to each of the other northern tier ports." (R. 3854; 314 I.C.C. at 198)

It added:

> "Moreover, for the reasons previously discussed, the evidence is persuasive that, so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports, and that, so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of those ports." (Ibid.)

The Commission's ultimate finding was that the proposed parity rates violated Section 3(1) of the Act, and it condemned the rates *solely* on this ground, saying:

> "Upon reconsideration we find that the proposed rates to and from Albany, New York, Boston and Portland, separately and collectively, are not shown to be reason-

> ably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports." (R. 3855; 314 I.C.C. at 199)

and

> "In other respects, the prior findings are affirmed." (Ibid.)

Again no appeal was taken from that part of the Commission's decision which directed cancellation of the proposed southern tier rates, but the Boston carriers (R. 3858) and the Massachusetts Port Authority (R. 3871) once again appealed, filing amended complaints.[8] The principal defendant, United States of America, filed an answer neither admitting nor denying the allegations of the complaint and thus, in legal effect, it again confessed error. (R. 3993) The Commission's answers admitted certain, and denied other, allegations (R. 3938-46), as did the answers of the intervening defendants. (R. 3947-3993)

On February 16, 1962, the three-judge District Court, after hearing, filed its opinion holding that the cancellation of the proposed northern tier rates was contrary to the mandates of the Act. (R. 3994; 202 F. Supp. 830) The court recognized that the Commission's decision was bottomed upon a Section 3(1) finding, but it held that the Commission had "wholly ignored" controlling legal principles (R. 4002; 202 F. Supp. at 836) and that, with respect to the Boston, Albany and Portland rates, the order was fatally defective for the additional reason that the Commission's ultimate conclusion of undue prejudice to the

[8] The intervening plaintiffs in the original complaint proceeding (page 6, footnote 6, *supra*) also sought review and filed amended complaints in the District Court. (R. 3884-3908).

southern tier ports was "completely contradicted" by the express finding that "equalization would not materially affect the flow of traffic to these ports." (R. 4005; 202 F. Supp. at 837-838) It therefore entered its order setting aside and enjoining the Commission's order insofar as it ordered cancellation of the proposed northern tier rates. (R. 4006) This appeal followed.

So far as concerns the *Boston rail carriers and Massachusetts Port Authority*, the sole question presented in this proceeding is whether the District Court was correct in granting the injunction sought by the Boston rail carriers. *Their position does not stand or fall on the validity of the District Court's action with respect to the rates at any of the other northern tier ports.*

Additional facts are stated hereinafter where they are necessary to the argument.

Summary of Argument

POINT I (pp. 16-33) demonstrates that the District Court correctly understood and analyzed the grounds of the Commission's decision with respect to the proposed Boston rates. That Court, composed as it was of three experienced judges, clearly understood that the Commission's order must stand unless infected by error of law or lacking in substantial evidence. (R. 3998-99) Accordingly, it carefully and meticulously analyzed the basis of the Commission's action, and accepted, as supported by substantial evidence, the Commission's basic findings:

> (A) That the present rate differentials have their origin and sole justification in promoting effective competition for Affected Territory traffic among all the North Atlantic ports. (E.g., R. 3745-47). The differentials admittedly "were designed; and their effect was,

to compensate for the differences in . . . ocean rates in favor of the northern tier ports" (R. 3745) by equalizing the through ocean-rail costs on this traffic. (pp. 18-22)

(B) That the "primary purpose" of the proposed Boston rates "is to *re-establish* the equality of through ocean-rail charges"[9] (R. 3804), which had ceased to be the fact by 1935, when the ocean-rate differential completely disappeared. (E.g., R. 3745) (pp. 22-23)

(C) That the present rail differentials exert an enormous impact upon cost-sensitive Affected Territory traffic. "*By far the largest in volume [of the traffic] is bulk cargo*" (R. 3753), which is "*peculiarly sensitive* to transportation costs." (R. 3800) Accordingly, because of the present rate differentials, the great mass of bulk cargo flows through the lower-rated southern tier ports (R. 3775) and, moreover, virtually none of it moves to or from Boston. (R. 3783; 3851) (pp. 23-28)

In addition, the District Court correctly recognized that the *sole* basis for the Commission's decision denying parity to the Boston carriers was its conclusion that the proposed rates would be unduly prejudicial to the southern tier ports, the *sole* subsidiary support for which was the Commission's mistaken emphasis on the factor of relative distance. (pp. 28-30)

Finally, the District Court was not confronted with any finding that the proposed northern tier rates were not just and reasonable. The Commission *expressly* found the southern tier rates not to have been shown to be just and reasonable (R. 3807, aff'd., 3855), but rested its conclusions with respect to the northern tier rates *solely* on Section

[9] Emphasis supplied throughout summary unless otherwise indicated.

3(1) (Ibid.). The District Court's discussion of the reasonableness of the northern tier rates, written as part of a thorough opinion, was intended to show only that the Commission had correctly refrained from finding any of the northern tier rates violative of Section 1. Thus, after reviewing the evidence before the Commission, the District Court concluded *only* that the northern tier carriers had made out an unrebutted *prima facie* case on reasonableness (R. 3001). It then said: "We now turn to the Commission's disposition of the case" (Ibid.), and thereafter discussed only the Section 3(1) problem (pp. 30-33).

Point II (pp. 34-57) demonstrates that the District Court correctly concluded on the record before it[10] that the Commission's decision was without rational basis in law because:

> (A) The Commission's conclusion in its Report on Reconsideration that the factor of relative distance must be accorded "substantial weight" (R. 3852, 3854) in the competitive port-rate making here involved represents an arbitrary and incomprehensible departure from thoroughly settled precedents, and, is a complete about-face from the position which the Commission itself had taken in the Original Report. There, after reviewing the matter at length, the Commission had concluded that it "is apparent that *considerable disregard* of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." (R. 3773) Moreover, the Commission does not even currently accord substantial significance to comparable or far greater relative distance disregard in *other* port rate-making cases. See, e.g., *Hills-*

[10] The Court, like the court in *The New York Central R.R. Co. v. United States*, 207 F. Supp. 483 (S.D. N.Y. 1952), properly refused to treat the questions before it as foreclosed to judicial review by any cloak of administrative expertise. (pp. 34-35)

borough County Port Authority v. Aharapee & Western Ry. Co., 313 I.C.C. 695, appeal dismissed, 207 F. Supp. 638; *City of Wilmington* v. *Alabama Great Southern R. R. Co.*, No. 33247, at page 24. Finally, it is to be recalled that detailed studies in evidence before the Commission demonstrated beyond doubt that Baltimore's 223 and Hampton Road's 38 miles average distance advantage is far less than the distance disregard characteristic in port rate-making. (App. 36-46)

(B) The Commission erred as a matter of law in ignoring the basic importance of the right of the Boston carriers' right to adjust their rates to meet competition as a defense to a charge of undue prejudice. E.g., *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 205-206, 217 et seq. The importance of this right is "not an open question in this Court." *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U.S. 144, 165,) because the Act is "not designed . . . to prevent competition between different roads." *Interstate Commerce Commission* v. *B. & O. R. Co.*, 145 U.S. 263, 276. These principles have been stressed over and over again.[11] And it has been specifically pointed out that it is contrary to the Act's purposes to deny rate adjustments merely because previous rates have been in effect for a number of years, *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U.S. 499, 507 — quite apart from the situation here, where the element which gave rise to the present rates relationship (the ocean differentials) has completely disappeared. In these proceedings the record shows

[11] E.g., *East Tenn., V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1, 14-20; *United States* v. *Illinois Cent. R.R.* 263 U.S. 515, 523-524; *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627, 636.

that the Commission totally ignored the Boston carriers' right to compete, and the few precedents of its own upon which it apparently relied afford no warrant whatsoever for such action. (pp. 46-5

(C) The Commission expressly found that, even with parity rates, the Boston carriers would be unable to attract any Affected Territory traffic (R. 3854). This finding as the District Court rightly pointed out, renders absurd the ultimate conclusion of "undue" prejudice—since before there can be "undue" prejudice, there must be actual or threatened *prejudice in fact*. The Commission's finding of no material traffic diversion reflects its belief that Boston's proposed action would be competitively futile. (E.g., R. 3846-47, 3851-52). But, plainly, such a belief is irrelevant. The sole justification for its order must inhere in the prevention of the evils proscribed by statute.[12] (pp. 53-57)

POINT III (pp. 57-60) demonstrates that recognition of the northern tier carriers' right to reduce their rates to a competitively required level does not by any means compel validation of corresponding reduction by the southern tier carriers, thereby preventing competition by their northern tier competitors. The proposed southern tier retaliatory rates must be shown to be just and reasonable and not unduly prejudicial. If they would have a monopolistic effect or cause destructive rate competition, they are unlawful because either result would be contrary to the National Transportation Policy. Accordingly, there is no merit in the contention (e.g., R. 3806) that recognition of the Boston car-

[12] In the past the Commission itself has recognized that forecasts of competitive futility were no reason for denying to carriers their right to try to compete. E.g., *Maritime Ass'n., Boston Chamber of Commerce v. Ann Arbor R.R.*, 95 I.C.C. 539, 572; *Galveston Commercial Ass'n. v. G. H. & S. A. Ru.*, 128 I.C.C. 349, 368. (pp. 56-57)

riers' right to reduce their rates, to eliminate a presently uncompetitive position necessarily carries with it a sanctioning of rate warfare." *The danger is illusory. The whole situation is subject to the power of the Commission, which may keep changes within bounds.*" *United States v. Chicago, M. & P. R.R. Co.*, 294 U.S. 499, 509.[13] And numerous decisions of the Commission recognize that differential-restoring rates will not be permitted if monopoly or rate war would ensue. E.g., *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 555; *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, 302 I.C.C. 109, 117.

Part IV (pp. 69-74) demonstrates that no basis exists on this record for recommittal of the Boston rates, whatever disposition may be made of the remainder of the appeal. No one disputes that, while ever watchful not to invade the administrative domain, this Court will not order recommittal unless the record warrants such a course. (pp. 60-62) Recommittal here would be unjustified with respect to the Boston rates because the record discloses no basis whatsoever for inferring that these rates are violative of the Act:

> (A) Since the Commission affirmatively found that the proposed Boston rates, even if effective, would result in no material traffic diversion, these rates could not possibly violate Section 3(1) of the Act. (pp. 63-64)
>
> (B) The Commission's technical omission affirmatively to find the proposed Boston rates just and reasonable is no warrant for further delaying the rights of the Boston carriers. The Commission, after

[13] Moreover, the southern tier carriers may never actually seek new rates if Boston, but not New York, is allowed parity, because basically they seem only to fear New York competition. In any event, the southern tier carriers probably would not be permitted by the Commission to increase the present rate differential vis-à-vis New York.

examining the evidence, rejected its Examiner's recommended finding that the northern tier carriers' rates had not been shown to be just and reasonable. The only evidence offered in rebuttal of the northern tier carriers' *prima facie* showing of reasonableness concerned *New York* harbor costs, which the Commission discussed at some length in its Original Report. (R. 3793) The Commission criticized this rebuttal evidence as not being representative, and as dealing only with the most costly-to-handle traffic, but found that, even accepting it, the New York rates would equal or exceed out-of-pocket costs including return on investment. No serious attempt was ever made to rebut the *prima facie* case of reasonableness of the Boston rates, and neither in its Original Report nor in its Report on Reconsideration did the Commission ever suggest any basis of record for finding the Boston rates not just and reasonableness. Nor could it have done so on the basis of the evidence before it. (pp. 64-70)

(C) The fact that the Boston carriers *may* require certain Fourth Section relief is of mechanical interest only and no warrant for recommittal. (pp. 70-72)

Moreover, additional important factors weigh heavily against recommittal. This proceeding has been pending before the Commission—which has twice considered the matter—and the courts for more than seven years, and recommittal can only portend interminable further delay—all of which, of course, is the aim of the southern tier carriers. The rights of the Boston carriers should not be further sacrificed. Furthermore, if the District Court be affirmed in its decision as to the Boston rates, the Commission is *not* thereby foreclosed from additionally considering the matter. This is an appeal from an order of the Commission made pursuant to the investigation and suspension pro-

cedure of Section 15(7). Complaint proceedings may still be used to inquire further into the validity of the rates; indeed, under Section 13(2), the Commission itself may institute such proceedings. On balance, therefore, this record clearly calls for affirmance, without remand. (pp. 72-74)

Argument

POINT I. THE DISTRICT COURT CORRECTLY ANALYZED THE FINDINGS AND GROUNDS OF THE COMMISSION'S DECISION.

In briefs which they have filed with this Court, the southern tier carriers, the southern port interests and the Interstate Commerce Commission itself have in some instances asserted and, in other instances, implied, that the District Court misinterpreted or misunderstood the reports and orders of the Commission and that this alleged misinterpretation or misunderstanding explains the judgment of the District Court—which they claim to be in error and seek to have overturned.

Included among the claims which the southern interests and the Commission now advance to this Court in this regard are such contentions—directly in the teeth of the Commission's findings—as the following:

(a) that the North Atlantic port differential adjustment was not really premised upon through ocean-rail rate equality but that distance was a prime determinant in fixing the differentials.

(b) that this proceeding does not really involve a voluntary effort on the part of the northern tier carriers to offset the loss of the ocean rate differentials which formerly favored their ports, but rather raises the question of whether parity may be "forced" upon the southern tier carriers.

(c) that the only traffic of real importance in the proceeding is general-cargo, and that bulk traffic is neither particularly important nor profitable to handle, and

(d) that the Commission did not really base its Section 3(1) finding in the case of Boston, Portland and Albany solely upon distance disregard but also on a belief that the northern tier ports (presumably as a group) already had a fair share of the total traffic.

Fair analysis of the Commission's reports and the District Court decision makes clear that these "interpretations" offered by the appellants are without substance.

The District Court's opinion manifests a keen awareness by that Court of the Commission's findings and conclusions concerning the historical background of the problem presented, the nature and purpose of the respective carriers' rate proposals, the issues which were framed for the Commission's consideration, the evidence which the Commission weighed and considered, the Commission's findings of subsidiary and ultimate fact and, finally, its conclusions of law. The District Court obviously fully understood the factual situation before the Commission, as well as the ingredients of and rationale for the Commission's ultimate decision. And, most important, that court, composed as it was of three experienced judges, understood clearly the limited role entrusted to it. At the very outset of its opinion, it recognized that it must not intrude upon the administrative domain, and, accordingly, must not disturb the Commission's action unless that action was infected by error of law or lacking in substantial evidence. (R. 3998-3999; 202 F. Supp. at 834).

A. The District Court Correctly Analyzed The Commission's Findings With Respect To The Origin And Purpose Of The North Atlantic Port Differentials And The Competitive Rationale Thereof.

In its preliminary discussion of the facts of the case, the District Court first described the existing rail rate differentials on import and export traffic and then said, with respect to the origin and purpose thereof,

> "The differentials were the result of an agreement entered into by North Atlantic port railroads in 1877. At that time ocean rates to Philadelphia and Baltimore were higher than to the northern tier ports and the object of the agreement was 'to avoid misunderstanding as to the geographical advantages of New York, Philadelphia, and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through these cities.'" (4R. 3997; 202 F. Supp. at 833)

In subsequently commenting upon the competitive rationale for the differentials, the District Court said,

> "In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to disparity in rail distances then or later. On the contrary, when the Thurman-Cooley-Washburn Advisory Commission concluded in 1882 that the differentials should remain, it specifically rejected the 'distance principle' as controlling port relationships and rested its award on the

principle of 'competitive opportunity.'" (R. 4003; 202 F. Supp. at 836)

This analysis by the District Court correctly paraphrases and summarizes findings to precisely the same effect which the Commission had made. Thus, the Commission's findings with respect to the origin and purpose of the differentials were that,

> "When the present differentials were established there were higher ocean rates to and from Baltimore and Philadelphia then to and from the northern tier ports. *The differentials were designed, and their effect was, to compensate for the differences in these ocean rates in favor of the northern tier ports. Thus, they tended to produce equal total transportation charges* between an interior point and the foreign origin or destination over all routes through the several ports, affording the different railroads and ports competitive rates." (R. 3744-45; 311 I.C.C. at 693-94) (Emphasis supplied.)

and further;

> "The present differentials, except for brief periods of disagreement between the carriers during the eighties, have been in effect since 1877 as the result of an agreement entered into by four North Atlantic port railroads, which had two objectives: To avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through those cities." (R. 3746; 311 I.C.C. at 694-95)

The Commission's findings with respect to the competitive rationale of the differentials were equally precise. The Commission quoted with approval from the report of the Thurman-Cooley-Washburn Advisory Commission,[14] which made a study of the differential in 1882. The Advisory Commission had first concluded that the rate differential should be maintained, *given the then-existing ocean differential*. It then issued the following important *caveat*:

> "*But we do not assume that the rates which are just today will be just indefinitely.* They have become established by the force of circumstances and they ought to give way if future circumstances shall be such as to render it right and proper. They constitute a temporary arrangement only; equitable as we think for the present, but which may become inequitable before the lapse of any considerable time. Whenever they shall be found to operate unfairly and to give a force or unnatural direction to trade and *whenever it shall appear that they tend to deprive any of the seaports affected by them of the proportion of business that would naturally come to it under the operation of normal competition, the want of equity in the rates will appear and it will be right to modify or perhaps abolish them.*" (R. 3746-47; 311 I.C.C. at 695) (Emphasis supplied.)

After quoting this language with approval, the Commission referred again to the Advisory Commission report, saying:

> "*Of the three principles referred to in that report*, mentioned variously by the parties as controlling these port relationships: *that is, the distance prin-*

[14] That Report is Exhibit AEB-1, (R. 109, 1627).

> *ciple, the cost principle, and the 'competitive' principle, the last named was found to be the true one* and was qualified only to the extent that it should operate in an atmosphere of controlled rate stability rather than of uninhibited rate cutting and competitive strife, "... This principle of 'competitive opportunity'... appears to have been the norm used in testing the soundness of the differentials from their inception. Thus, the advisory commission concluded that the differential rates reflected and were subordinate to that principle ..." (R. 3747; 311 I.C.C. at 695) (Emphasis supplied.)

Still later in its Original Report the Commission returned to the purpose of the rate differential. Referring to its earlier decision in *Matter of Differential Rates*, 11 I.C.C. 13, it said:

> "The conclusion reached [there] was that, in the public interest, the rates should be so adjusted 'that all the ports and the various lines serving them may *fairly compete* for this traffic.'" (R. 3773; 311 I.C.C. at 716) (Emphasis supplied.)

And it then quoted with approval from *Albany Port District Comm. v. Alnapco & W. R. Co.*, 219 I.C.C. 151, wherein the Commission said, of port rates,

> "They are not distance rates." (Ibid.)

Finally, in that part of its Report entitled "Discussion and Conclusions", the Commission concluded with respect to the differential adjustment:

> "It was the purpose of that structure that ... 'these [North Atlantic] ports shall all be kept open ... for

export business upon such terms that *each one may fairly compete for it.*'" (R. 3804; 311 I.C.C. at 739). (Emphasis and parenthetical phrase supplied.)

B. *The District Court Correctly Analyzed the Commission's Findings That The Northern Tier Carriers' Proposed Rates Were Published To Overcome The Competitive Disadvantage Confronting Them As A Result Of Ocean Rate Equalization.*

The District Court aptly and succinctly summarized the reasons for the northern tier carriers' proposed parity rates as follows:

> "Beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports consequently become higher than the combined cost of rail and ocean transportation through a southern tier port. It is this competitive disadvantage which the plaintiff railroads sought to remove with their proposed rate schedule." (R. 3997; 202 F. Supp. at 833)

Once again, this summarization by the District Court amounted to an inaccurate restatement and analysis of the Commission's findings. Thus, the Commission had found,

> "Beginning in the early twenties and extending to about 1935, the ocean rates to and from the different ports were equalized. Consequently, the sum of the rail and ocean transportation charges through the northern tier ports served by the respondents became higher than the sum of those charges through the southern tier ports served by the protestants, by the

amounts of the above differentials." (R. 3745; 311 I.C.C. at 694)

and further,

"The *primary purpose* of the proposed adjustment, as the respondents and the principal northern tier port interests emphasize, *is to reestablish the equality of through ocean-rail charges* which existed prior to the ocean-rate equalization in 1935." (R. 3804; 311 I.C.C. at 740) (Emphasis supplied.)

C. The District Court Correctly Analyzed The Commission's Findings With Respect To The Impact Of Rate Differentials Upon The Routing Of The Principal Traffic—Bulk Cargo:

The District Court's analysis of the Commission's findings with respect to the impact of rate differentials upon the movement of import and export traffic also reflects that Court's clear understanding of the factual situation presented to the Commission and of the Commission's appraisal thereof.

The Court adopted (R. 4000; 202 F. Supp. at 835), by direct quotation, the Commission's classification of cargo by type and its finding that bulk cargo constitutes by far the largest volume of traffic movement. This finding was as follows:

"Oceanborne commerce is classified into two types of cargo. *By far the largest in volume is bulk cargo.* It consists generally of low-value, heavy-volume raw materials which are handled at the port by mechanical facilities and provide bottom loading for ships or may move as full cargoes. The other type, called general

cargo, includes principally manufactured and semi-manufactured goods of relatively high value, which are usually packaged." (R. 3753; 311 I.C.C. at 700) (Emphasis supplied.)

The Commission's finding, moreover, that bulk cargo represents, by any test, the largest volume of movement is unassailable, and has never been questioned. In this connection, the Commission's Original Report shows that, of 10,969,757 net tons of export-import traffic moving during an appropriate test period between Affected Territory and the North Atlantic Ports, 6,251,234 net tons, or 57%, consisted of grain and of bulk ores.[15] (Appendix F; R. 3820; 311 I.C.C. at 751) Similarly, Appendix E to that Report (R. 3819; 311 I.C.C. at 750-751) shows that, if there be subtracted from the aggregate net tons moving through the North Atlantic Ports the net tonnage of manufactures and miscellaneous and forwarded traffic, the remaining traffic (products of agriculture, animals and products, products of mines and products of forests) constitutes 65% of the total. Thus, the Commission found:

> "Excluding goods exported to Canada and Mexico, . . . the movement of United States manufactures to foreign markets *has been steadily declining*. The *principal movement* of both exports and imports *is raw materials*. . . ." (R. 3753; 311 I.C.C. at 700) (Emphasis supplied.)

The District Court properly recognized the importance of the Commission's findings that rate differentials have a profound influence upon the movement of export and im-

[15] The 6,251,234 net tons do not include iron ore or concentrate because the rates on these commodities were not the subject of the proceeding before the Commission.

port traffic to and from Affected Territory, which differentials are of particular importance in the case of the predominant traffic—bulk cargo—due to its greater sensitivity to cost differences. The Court noted in this regard the ample evidentiary support for the proposition that the differentials are of controlling importance.

> "There was, furthermore, extensive evidence from shippers, both private and representatives of various agencies of the United States, that the differential adjustment is a controlling consideration in their choice of ports." (R. 4000; 202 F. Supp. at 835)

as well as for the finding that the southern tier ports now have a dominant position in the movement of import-export traffic to and from Affected Territory,

> "In order to present a clearer and more complete picture of comparative traffic between all North Atlantic ports and affected territory the railroads conducted traffic studies during 1955-56 which showed that 75.8 per cent of imports and 63.7 per cent of exports (measured by carloads) moved through the southern tier ports." (R. 3999; 202 F. Supp. at 834)

that such traffic studies clearly demonstrated that

> ". . . the preponderance of southern tier traffic consists of bulk cargo. . . ." (R. 4000; 202 F. Supp. at 835)

and that this is an inevitable consequence of the differential advantage which the southern tier ports enjoy. As the Court said,

"It is also apparent, however, that bulk cargo is necessarily more sensitive to rate differentials and the Commission implicitly so acknowledges by noting that the equalization of ex-lake rates on grain from Buffalo has resulted in a shift of the relative shares of that traffic in favor of the northern tier ports." (Ibid.)

The District Court's summary was in precise accord with the Commission's findings of fact. Thus, the Commission found that, even taking into consideration other factors:

"... a *change in the differentials* could be expected to cause a *shift in a substantial volume* of the traffic." (R. 3804; 311 I.C.C. at 740) (Emphasis supplied.)

And dealing with the *particular sensitivity* of *bulk* traffic (which it had found to be the predominant Affected Territory traffic) to the cost of shipment, the Commission said:

"The most important factors which influence the shipper of export or import freight in the choice of a port are the total cost of hauling the goods, the total time in transit via competing ports, and the service available at each port. The hauling cost involves principally the ocean freight and the rail freight rate. . . .

"Importance of time in transit depends upon the kind of freight. As freight rates are small in relation to the value of high-grade traffic, they may be of less concern to a shipper than time in transit. . . . On the other hand, *the shipper of low-grade freight, as to which the transportation cost represents a greater proportion of the delivered price, generally uses the lowest-cost route to remain competitive*, and time in transit

> is a secondary consideration. Port services, particularly forwarding, banking insurance, brokerage service, and availability of sailings are important, but relatively less so in the case of low-grade freight than of high-grade tonnage." (R. 3775; 311 I.C.C. at 717). (Emphasis supplied.)

and

> "As *bulk commodities*, because of their low value, are *peculiarly sensitive* to transportation cost, the differential has greater influence on their movement than on general cargo." (R. 3800; 311 I.C.C. at 737) (Emphasis supplied.)

Those findings, moreover, were compelled by the showing of Appendix F to its Original Report (R. 3820; 311 I.C.C. at 751), which demonstrates that *virtually all of the major bulk traffic moves through the lower-rated ports*. Thus, it shows that 83.5% of export grain (the principal bulk export commodity shipped from Affected Territory) moved through Baltimore, Philadelphia or Hampton Roads (50% moving through Baltimore) and that 98.1% of import ore, the principal import destined to Affected Territory, moved through Baltimore, Philadelphia or Hampton Roads (85.1% of the total moving through Baltimore alone).

The same source data also show conclusively that the *Boston carriers*, under the present differential adjustment, *attract* virtually *no* Affected Territory *traffic*. Thus the Commission found, with respect to *exports*, that, of 8,171,479 net tons of exports moved from Affected Territory through the North Atlantic Ports, *only* 361,772 net tons, or *4.4% of the total, moved through Boston*, whereas 5,207,325 net tons, or 63.7% moved through Baltimore, Philadelphia and Hampton Roads, and, of this, 3,363,499 net tons, or

40.4% of the total, moved through Baltimore alone. With respect to *import traffic* destined to Affected Territory, the Original Report shows Boston with an even smaller proportion of the total Affected Territory tonnage. The total imports moving through all North Atlantic Ports was 2,798,278 net tons, and of this total, *only* 17,739 net tons, or *6/10ths of 1%, moved through Boston*, whereas 2,121,822 net tons, or 75.8%, moved through Baltimore, Philadelphia and Hampton Roads, of which 1,644,844 net tons, or 58.8% of the total moved through Baltimore alone. (Appendix F; R. 3820; 311 I.C.C. at 751)

The Commission, therefore, had no choice but to conclude that

> "... little traffic ... moves between the port [of Boston] and the Affected Territory" (R. 3783; 311 I.C.C. at 724)

a finding expressly confirmed in the Report on Reconsideration. (R. 3851; 314 I.C.C. at 196)

D. The District Court Correctly Analyzed The Grounds Of The Commission's Decision With Respect To The Boston Carriers' Rates.

In briefs which they have filed with this Court the southern tier carriers and port interests, as well as the Commission, have asserted that the District Court erred in its analysis of the Commission's report and order. In advancing this claim, the southern interests and the Commission seek to inject confusion into the proceeding by failing to distinguish between what the Commission and the District Court had to say concerning the New York carriers' rates, on the one hand, and the other northern tier carriers' rates—including the Boston carriers'—on

the other hand. Defense of the District Court's action in respect of the New York carriers' rates will be ably presented in the briefs filed on behalf of the New York carriers and port interests. It is the purpose of this brief, and in particular this portion, to make clear that the District Court correctly understood and analyzed the Commission's decision insofar as it dealt with the Boston carriers' rates.

1. The District Court Correctly Analyzed the Section 3(1) Ground for the Commission's Decision With Respect to the Boston Carriers' Rates.

Although the southern tier carrier and port interests, as well as the Commission, would have this Court believe differently, the unassailable fact is, as the District Court properly found, that at least so far as concerns the Boston carriers' rates,

> "The Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single subsidiary finding, the distance disadvantage of the northern tier ports." (R. 4003; 202 F. Supp. at 836)

None of the Commission's other subsidiary findings tends in any way to give credence to the claim that the rate relationship involved might give rise to undue preference and prejudice. Indeed, the only other subsidiary finding which bears at all upon the issue of the lawfulness *vel non* of the Boston carriers' proposed rates under Section 3(1) negatives any possibility that such rates might give rise to undue prejudice. That finding, as the District Court pointed out, is that,

> "with respect to the ports of Boston, Albany and Portland, 'equalization would not materially affect the flow

of traffic to these ports.' " (R. 4005; 202 F. Supp. at 837)

and such a finding, as the District Court properly recognized,

> ". . . completely contradict(s) the Commission's ultimate conclusion of undue prejudice to the southern tier ports. . . ." (R. 4005; 202 F. Supp. at 837-838)

Although the Commission indicated its belief that, in the case of New York, equalization of rates was not necessary to enable that port to compete, *no one*—least of all the Commission—*has ever suggested that Boston can compete without parity rates, and no one has ever suggested that, with parity rates, Boston would be overly-competitive.* Indeed, *the Commission's own finding is precisely to the contrary*—that, even with parity rates, Boston would not be effectively competitive. This finding, alone, affords ample proof that Boston's distance disadvantage was, indeed, the only premise for the Commission's finding that parity rates to and from Boston would offend against Section 3(1) of the Act.

2. Although the District Court At One Point Wrote Less Then Clearly Concerning The Commission's Finding With Respect to Justness and Reasonableness, It Correctly Dealt With That Matter In Its Opinion.

In its introductory statement, the District Court included the Commission's finding that the southern carriers' proposed rates "are not shown to be just and reasonable" in its summarization of other Commission findings in a manner which might seem to indicate that the finding refer-

red to the northern carriers' rates. Thus the Court, speaking of the "proposed rates" and without differentiating between rates proposed by the northern carriers and those proposed by the southern carriers, referred to

> "findings that the 'proposed rates are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports'; that they 'would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports,' and that they 'are not shown to be just and reasonable.' 'Equalization of Rates,' *supra*, at 741, 742." (R. 3997; 202 F. Supp. at 833)

The District Court was clearly right that the finding in question related to "proposed rates"; it should perhaps have made more clear the fact that it referred *only* to the southern tier carriers' proposed rates. The finding in question first appeared in the final paragraph of the majority opinion in the Original Report and was as follows:

> "We further find that the proposed rates of the *protestant* railroads are not shown to be just and reasonable." (R. 3807; 311 I.C.C. at 742). (Emphasis supplied.)

This finding was not reiterated in terms in the Report on Reconsideration but was dealt with, as were most other findings in the Original Report, by the closing statement of the majority opinion that:

> "In other respects, the prior findings are affirmed." (R. 3855; 314 I.C.C. at 199)

That the finding applied to, *and only to*, the southern tier carriers' proposed rates is not open to debate. At the outset of its Report on Reconsideration, the Commission, after reciting that in the Original Report it had found that the northern tier carriers' rates would cause undue preference and prejudice, continued as follows:

> "We found also that schedules by which the *protestant railroads* proposed . . . to *reduce their rates between the southern tier ports and the interior territory*, and thus restore the present relationships; *were not shown to be just and reasonable*." (R. 3837; 314 I.C.C. at 185) (Emphasis supplied.)[16]

While the District Court's initial summary of Commission findings did not sharply pinpoint the aforementioned distinction, it is abundantly clear that the District Court fully understood the Commission's "just and reasonable" finding to relate *only* to the southern carriers' rates. Thus, the Court nowhere treated the finding as one which would have to be set aside before the Commission's order could be overturned. It merely reviewed the evidence and position of the northern carriers that they were relying on a *prima facie* showing of revenues, the defensive countering that, in the case of New York, the rates were not sufficient to cover costs, and the Commission's finding that, even in the case of New York, with its special cost situation, the rates would equal or exceed out-of-pocket costs including a 4% return on investment. (R. 3999-4001; 202 F. Supp. at 834-835). From this the Court concluded that no real con-

[16] The contention advanced to this Court by the Commission, at pages 67 and 68 of its brief, that,

> "In addition to its findings under Section 3(1), the Commission concluded that the proposed reduced rates to the northern tier ports 'are not shown to be just and reasonable' (R. 3807)."

is simply error.

troversy existed as to whether the northern carriers' rates were just and reasonable, and *very significantly* said,

> "*We now turn to the Commission's disposition of the case:*" (R. 4001; 202 F. Supp. at 835) (Emphasis supplied.)

This, we submit, is a clear indication that the District Court recognized the issue of justness and reasonableness of the northern rates not to be before it, that the finding previously mentioned related only to the southern rates and that the correctness of that finding had not been appealed from and was, therefore, not before the Court. The Court plainly recognized that the Commission had based its decision with respect to the proposed northern tier rates *solely* upon considerations of undue preference and prejudice, for after turning "to the Commission's disposition of the case", it never again referred to justness and reasonableness. The context of its opinion thus clearly indicates the District Court's belief that the record before it presented no *bona fide issues* of justness and reasonableness. In substance, the District Court, as an integral part of writing a complete opinion, summarized the evidence to show only that on the evidence the Commission quite properly refrained from finding any of the proposed northern tier rates to be unjust and unreasonable.

POINT II. THE DISTRICT COURT CORRECTLY RULED THAT THE COMMISSION HAD MISAPPLIED THE LAW AND THAT ITS DECISION WAS WITHOUT RATIONAL BASIS.

A. The District Court Correctly Concluded That The Questions Presented For Judicial Review Are Not Foreclosed By Any Doctrine Of Administrative Expertise.

At the outset it is necessary to clear away the coating with which the appellants here seek to encase the Commission's determinations. They assert that nothing more is involved than the Commission's expert appraisal and weighing of various relevant factors; and, so the argument runs, the scope of review by the three-judge court is therefore fixed by such cases as *Alabama Great Southern Ry. Co. v. United States*, 340 U.S. 216, 223-224, where this Court recognized the there unquestioned principle that it is the Commission, not the courts, that is charged by Congress with the primary responsibility of weighing the factors involved in ascertaining whether proposed rates are unduly prejudicial. However, such a characterization of the questions presented for review lacks substance.

No one disputes that the Commission is charged with the primary responsibility for weighing the various factors relevant in determining whether proposed rates are unduly prejudicial. But that is not to say that the Commission is entitled to discharge the weighing process with a wholly erroneous conception of the controlling legal principles. The claim of administrative "expertise" in weighing is no answer when the offense is that the Commission put the wrong weights into the scales. As will be shown below, the Commission, in its Report on Reconsideration, has suddenly and unjustifiably interpreted Section 3(1) as *requiring* it to

give *controlling* significance to the factor of relative distance in port rate cases, even where rates are adjusted to meet competition. It has done so despite the fact, as is shown in detail hereafter, that the relative distances in this case are *far less* than those disregarded in the vast majority of other port rate cases. Moreover, with equal suddenness and lack of explanation, the Commission has minimized or wholly ignored the legal significance of the Boston carriers' right to publish rates to meet competition. Finally, it found that the proposed Boston rates would be unduly prejudicial despite its conclusion that, even with parity rates, the Boston carriers would be unable to attract Affected Territory traffic. These errors are in flat contradiction to the teachings of this Court, as well as contrary to the Commission's own precedents.

By ascribing controlling significance to relative distance, by disregarding the carriers' right to attempt to meet competition, and by finding undue prejudice in the teeth of its own conclusion that there would be no actual injury, the Commission evaluated the record before it on the basis of an erroneous conception of the relevant legal standards. Clearly, what are essentially errors of law cannot be converted into matters of expertise by simple fiat.

The posture of this case on review is, therefore, clear. It falls squarely within the familiar rule that *the Commission's determination cannot stand if it is unsupported by the evidence or is founded upon an erroneous construction of the statute*. E.g., *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 6-7 (and cases cited). Accordingly, the court below (like the court in *The New York Central R.R. Co.* v. *United States*, 207 F. Supp. 483 (S.D.N.Y. 1962) (discussed infra p. 36)) properly treated the precise questions here presented as not foreclosed to judicial review by any cloak of administrative expertise.

B. *The District Court Was Correct In Ruling That The Commission Erred As A Matter Of Law In Concluding That The Boston Carriers' Proposed Rates Are Violative Of Section 3(1) Of The Act.*

1. The Commission's Conclusion That Relative Distance Must Be Accorded Controlling Significance in Port Rate Making Is Erroneous As a Matter of Law.

a. Such conclusion represents an arbitrary break with the Commission's own precedents.

The fulcrum of the Commission's finding that the proposed Boston rates are violative of Section 3(1) is, as the District Court pointed out, its emphasis upon the factor of relative distance. But its conclusion that this factor must be accorded "substantial weight" (R. 3852; 314 I.C.C. at 197) in competitive port rate-making, otherwise the result would run "counter to the provisions of Section 3(1)" (R. 3854; 314 I.C.C. at 198), represents an arbitrary and incomprehensible departure from thoroughly settled precedents.

The court below so recognized, observing that, until its decision on reconsideration in this case, the Commission had consistently minimized relative distance as a significant factor in port rate proceedings. (R. 4003; 202 F. Supp. at 836-7) The precedents referred to by the Court below were also recently reviewed in *The New York Central Railroad Company* v. *United States*,[37] decided June 27, 1962. There, as here, a three-judge court unanimously rebuffed the Commission on this very issue, in an opinion written by

[37] 207 F. Supp. 483 (S.D.N.Y. 1962). At issue was an attempt by New York carriers to publish tariffs so as to eliminate the differential in favor of the southern tier carriers on the import of iron ore from New York to interior steel producing points.

Circuit Judge Friendly, summarizing the Commission's attitude, as reflected in "a few of the many decisions that could be cited", Judge Friendly said,

> "... *the Commission has never adopted a doctrinaire position that any failure to bring rail charges into exact accord with differences in distance is a preference or prejudice, much less an undue one.* One *reason is* that although distance must have some effect on rail transport costs, *the relationship is by no means direct.* Even on transportation in the same direction over the same line, a heavy proportion of total costs is represented by originating and terminating expenses, as well as overhead expenses, such as accounting, which do not vary with mileage. When different carriers are involved, still other factors enter into the comparison. Neither had the Commission ever insisted that rates to or from competing markets or ports should cover cost by precisely the same margin. Hence the fact that differentials based on longer mileage and higher cost may not be an undue prejudice to the higher rated port has never been thought to mean, in and of itself, that equalization would unduly prejudice the formerly lower rated one.
>
> "*In no area has the Commission taken a less rigid attitude in requiring precise adjustment of rates to distance or even to costs than with respect to rates on import and export traffic.*" 207 F. Supp. at 490 (Emphasis supplied.)

b. Such conclusion represents a wholly unexplained about-face from the position taken by the Commission in its Original Report.

Perhaps the single most startling aspect of the Commission's action is that it represents a completely unexpected

and wholly unexplained *volte-face* from the views the Commission itself had expressed in its Original Report. As heretofore shown (pp. 19-22, supra), the Commission, completely in accord with settled precedents, there underscored the insignificance of relative distance as a factor in competitive port rate-making. It referred with approval to the 1882 report on port differentials by the Thurman-Cooley-Washburn Advisory Commission, and, as heretofore pointed out, said,

> "*Of the three principles referred to* in that report, mentioned variously by the parties as controlling these port relationships; *that is*, the *distance principle*, the *cost principle*, and the *'competitive principle,' the last named was found to be the true one.* . . ." (R. 3747; 311 I.C.C. at 695) (Emphasis supplied.)

The Commission went on to underline specifically the unimportance of relative distance to the matters at hand. It reviewed the arguments on distance pressed upon it (R. 3772-73; 311 I.C.C. at 715), and then flatly and unequivocally *rejected* relative distance as being of any material significance in port rate differentials, saying:

> "*It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with.* See *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 696. In considering this matter in an early proceeding, *In the Matter of Differential Rates, supra* (1905), and the justness of the suggestion that each port should be given the rate to which its location entitles it, this Commission observed that *traffic does not stop at the ports but moves to foreign destinations, that more important was* the

fact that as *seaports* the four large cities from Boston to Baltimore, inclusive, *had a fundamental advantage of location which entitled them to participate in the foreign trade, and that the public interest required that this be recognized.* The conclusion reached (page 77) was that, in the public interest, the *rates* should be *so* adjusted *'that all the ports* and the various lines serving them *may fairly compete* for this traffic.'" (R. 3773; 311 I.C.C. at 715-716) (Emphasis supplied.)

Continuing in precisely the same vein, the Commission further said,

> "That this is also the purpose of the 1935 amendment to section 3 of the act was indicated in *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co., supra; Nueces County Nav. District No. 1* v. *Baltimore & O. R. Co.*, 223 I.C.C. 75, 96; and *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I.C.C. 165, 179. In the *Albany*[18] case, at page 162, we said:
>
> > *'The port rates* * * * *have, as their chief objective, the maintenance of a competitive relation between the ports. They are not distance rates.* * * * [A]*dherence to the distance principle is incidental*, and always gives way when necessary to the maintenance of the differential relation between the ports.'" (R. 3773; 311 I.C.C. at 716) (Emphasis supplied.)

In its Report on Reconsideration, however, the Commission did a complete about-face on this very issue. Relative distance became the fundamental principle on which the

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[18] *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151.

Commission rested its determination to deny parity to the Boston carriers. The Report on Reconsideration is, however, singularly barren of any explanation for this action and, therefore, appellees and the court below are at a complete loss to understand by what process that which had been dominated "incidental" was transmuted into a factor of controlling significance.

c. The Commission does not even currently accord controlling significance to relative distance in other port rate-making cases.

Although it arbitrarily proclaimed the controlling importance of relative distance in the case at bar, the Commission is currently and consistently applying the orthodox doctrine elsewhere. Thus, in *Hillsborough County Port Authority v. Ahnapee & Western Ry. Co.*, 313 I.C.C. 695,[19] decided May 17, 1961, the Commission *ordered* the railroads to make effective to Tampa, Florida, import and export rates on the same basis as those applicable at the Gulf and South Atlantic ports, even though the average distance to Tampa was shown to be 304 miles longer than the average distance to the Gulf ports. Indeed, in many instances the disregard of distance involved in that proceeding was striking. For example, from Pittsburgh, Pennsylvania, the distance to the nearest South Atlantic port is 660 miles; compared with 1,193 miles to Tampa. See also, in *City of Wilmington v. Alabama Great Southern R.R. Co.*, No. 33247, decided June 14, 1962, the Commission defined its general policy in port rate proceedings in language wholly at variance with what it said here:

[19] An appeal in the United States District Court for Southern Alabama was dismissed by a *per curiam* order on July 6, 1962. *Alabama, Tenn. & N.R.R. v. United States*, 207 F. Supp. 638.

> "The general policy of the Commission in cases of this kind has been to permit or require equalization where the geographically-handicapped port appeared to be at a serious competitive disadvantage by reason of the rate adjustment, provided that such equalization was confined within reasonable limits determined by the needs of the ports concerned, the carriers serving them, and the shipping public." (Sh. 24).

No one, of course, suggests that the Commission must place itself in a strait jacket, unable to treat situations differently when different treatment is warranted. But, surely, differences in treatment must reflect an articulated, rational basis. In suddenly and without explanation reversing its position, disregarding its own precedents and contemporaneous decisions, and treating this situation in a most singular fashion, the Commission obviously strikes at notions deeply embedded in our law. See Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 863, 879-883.

2. The Commission Correctly Found That The Northern Tier Ports Have Much Less Distance Disadvantage Than Exists In Other Parity or Near Parity Adjustments.

The Commission's Original Report itself puts to rest any possible basis for contending that Boston's distance disadvantage or that of any of the other northern tier ports is in any way excessive by normal port adjustment standards. Thus, the Commission noted that there was "*much evidence of record*,"

> "relating to distances by rail between representative points in the affected territory and the several North

> Atlantic ports, including Canadian ports; also between them and other interior points and South Atlantic and Gulf ports; and by ocean between these United States ports and representative overseas ports." (R. 3772; 311 I.C.C. at 715.)

It further noted the position of the northern tier carriers and port interests, as follows:

> "The respondents and the northern tier port interests deny that they have any significant disadvantage in their rail distances as compared with the southern tier ports." (Ibid.)

It then proceeded to make a flat and unequivocal finding that the distance disadvantages of the northern tier ports are *much less* than those extant elsewhere in parity or near-parity adjustments, saying,

> "Such distance disadvantage as they have *are much less than the substantial* differences in distances to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several South Atlantic and Gulf ports are equalized." (Ibid.) (Emphasis supplied.)

Such a finding was, of course, compelled by the uncontrovertible evidence before the Commission. Witness Brooks, a transportation and traffic consultant, testified on behalf of the northern tier carriers and port interests. He presented extensive analyses of rate adjustments involving distance disregard, and comparisons thereof with the distance disregard proposed by the northern tier carriers in this proceeding. These comparisons included showings,

among others, that, in contrast with this case, where the average distance from Affected Territory to Baltimore is 228 miles shorter than to Boston, and from Affected Territory to Hampton Roads *only 18 miles* shorter:

(1) Export and import rates are equalized between numerous differential territory points and the major Gulf and South Atlantic ports, notwithstanding mileage differences of from 300 to 400 miles. (Ex. 711, R. 2045)[20]

(2) Export and import rates are equalized from Milwaukee to both Baltimore and Corpus Christi, notwithstanding the 510 mile greater distance to Corpus Christi. (Ex. 710, R. 2043)

(3) Import rate equalization prevails on various commodities to southeastern points from South Atlantic ports involving mileage disregard of as much as 328 miles. (Ex. 712, R. 2049)

(4) Import commodity rates from Gulf ports to southwestern points are equalized, even though they involve mileage disregard of as much as 553 miles. (Ex. 713, R. 2051)

(5) Equalized export-import commodity rates between Texas and Louisiana interior points and Texas and Louisiana ports involve mileage disregard of as much as 252 miles. (Ex. 714, R. 2054)

(6) Export-import rates between North Dakota, Texas and New Mexico points, on the one hand, and the widely distant ports of Los Angeles and Seattle, on the other, *are equalized in disregard of mileage differences* of as much as *1494 miles*. (Ex. 715, R. 2059)

Witness Brooks also showed that, on traffic other than

[20] References to Exhibit 28 introduced in evidence at R. 2773 are hereinafter only to the record page on which the testimony appears. References to Exhibits 711 et seq. are references to exhibits which were presented as a part of Exhibit 28 and which consist of various charts. They will be cited by exhibit number along with their record references.

export-import traffic, carriers with circuitous routes serving the same port were allowed to ignore distances of as much as 475 miles in order to compete with the carrier having the shortline route. (Exs. 721 and 723; R. 2072, 2076)

Witness Brooks' testimony was confirmed and supplemented by Witness Day,[21] Transportation Manager for the Greater Boston Chamber of Commerce, and a rate and traffic expert of many years standing (Ex. 29; R. 277, 2093). His Exhibit 163 (R. 2181), a copy of which is attached to this brief as Appendix "B", conclusively and graphically demonstrates that relative distance plays little or no part in competitive port rate making. Mr. Day pointed out that *Portland is on the Baltimore basis with respect to import rates although the average distance disregard involved is almost 300 miles*[22] (Ex. 160, R. 2144); that import rates from the North Atlantic ports of Halifax, St. John, Montreal, Portland and Norfolk are equalized on the Baltimore basis to differential territory points despite wide mileage differences, and that export rates from Halifax, St. John and Portland are on the Boston basis despite extremely wide mileage disparities (Ex. 162, R. 2145)

Percentage computations of the mileage disregard inherent in the proposed and other existing adjustments were also introduced. Based on the Commission's finding that in this case the average short line distance to Baltimore is 638 miles; to Hampton Roads, 883 miles; and to Boston, 925 miles, it is apparent that Baltimore's *distance ad-*

[21] Citation of the testimony of Witness Day will be in the manner in which Witness Brooks' testimony was cited. See footnote 20, *supra*.

[22] The Commission in its Report on Reconsideration *inexplicably* denies parity export rates to the Portland carriers because of the distance disregard involved and yet for years has allowed them to retain the advantage of differential rates on import traffic despite the same distance disregard.

vantage over Boston is approximately 30%, while that of *Hampton Roads over Boston is a mere* 4%. The following recapitulation shows that these percentage differences are well within the range, and considerably below the average of customary disregard. Thus:

(i) Parity import rates are in effect from Portland and Baltimore to numerous Affected Territory points as listed in Exhibit 29, Ex. 160, (R. 2144) Distance disregard averages 41%

(ii) Parity import and export rates with Baltimore are in effect between major South Atlantic and Gulf ports and Affected Territory points as listed in Exhibit 28, Ex. 710, (R. 2043) Distance disregard averages 59%

(iii) Parity import and export rates are in effect between major South Atlantic and Gulf ports and Affected Territory points as listed in Exhibit 28, Ex. 711. (R. 2045) Distance disregard averages 56%

(iv) Parity import and export rates are in effect between all United States and Canadian North Atlantic ports (except Montreal) and interior Canadian points as listed in Exhibit 28, Ex. 716, (R. 2060) Distance disregard averages 138.5%

(v) Parity import and export commodity rates are in effect between the ports of Seattle and Los Angeles, on the one hand, and North Dakota, Texas and New Mexico points, on the other hand, as listed in Exhibit 28, Ex. 715, (R. 2058-59) Distance disregard ranges from 50% to 153% and averages 73%

(vi) Parity import rates are in effect from South Atlantic and Gulf ports to certain

southeastern interior points as listed in Exhibit 28, Ex. 742. (R. 2047-49) Mileage disregard ranges from 21% to 100%, and averages 44%

(viii) Parity import rates are in effect from Gulf ports as listed in Exhibit 28, Ex. 713. (R. 2051) Mileage disregard ranges from 17% to 119%, and averages 43%

(viii) Parity import and export commodity rates are in effect between Texas and Louisiana ports and interior Texas and Louisiana points as listed in Exhibit 28, Ex. 714. (R. 2054) Mileage disregard ranges from 34% to 186% and averages 93%

3. The Commission Erred, As A Matter of Law, In Ignoring The Boston Carriers' Right To Compete.

a. The law is clear that a carrier's right to compete for traffic is a transportation condition which may not be ignored in assessing the lawfulness of its rates.

An unbroken line of decision in this Court stresses that competition between carriers is one of the cornerstones of the Interstate Commerce Act, and, consequently, that a carrier's right voluntarily to adjust its rates to meet competition is of critical importance as a defense to any charge that the rate adjustment creates *undue* preference and prejudice.

As long ago as *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 205-206, 217 *et seq.*, this Court emphasized the fundamental importance of the carrier's right to meet competition as a transportation condition

charge that its rates were unduly prejudicial. There, lower import than domestic rates on the same traffic were sanctioned because water and rail-and-water competition would otherwise have prevented New Orleans carriers from effectively competing for import traffic.

Only a few years later, this Court was to say that the importance of meeting competition as a justification for rates was "... not an open question in this Court" (*Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U.S. 144, 165,) because, of course, the Act is "not designed ... to prevent competition between different roads." *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U.S. 263, 276.

The importance of meeting competition as a defense to charges that rates are *unduly* prejudicial was noted again in *Louisville & N. R. Co.* v. *Behlmer*, 175 U.S. 648, 674; discussed at considerable length in *East Tenn., V. & G. Ry. Co.* v. *Interstate Commerce Commission*, 181 U.S. 1, 14-20; and again reaffirmed in *Interstate Commerce Commission* v. *Clyde Steamship Co.*, 181 U.S. 29. The same principal was clearly and expressly recognized in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 47-48; *Intermountain Rate Cases*, 234 U.S. 476, 483; *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 523-524;[23] and tersely stated by Mr. Justice Roberts in *Texas & P. Ry. Co.* v. *United States*, 289 U.S. 627:

"The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions,

[23] "The effort of a carrier to obtain more business and to retain that which it had secured, proceeds from the motive of self interest which is recognized as legitimate .... To bring a difference of rates within the prohibition of §3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their

and that such action does not amount to undue discrimination." (Id. at 636)

After observing that the purpose of the Act was "not to stifle competition" (ibid.), the opinion specifically recognized that competition could be met "by equalizing rates or maintaining differentials." (Id. at 637). And, without exception, the more recent decisions of this Court recognize the importance of competition as a justification for rates alleged to be unduly prejudicial. *United States* v. *Chicago, M. & St. P. R. Co.*, 294 U.S. 499; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 358, 379; *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194, 201-202, especially at note 8; *Alabama Great Southern Ry. Co.* v. *United States*, 340 U.S. 216, 224.

This Court's opinion in the *Chicago* case is significant not only for its reaffirmance of the carrier's general right to "'adopt such policy of rate making as to it seems best'" (id. at 506), but also because it puts completely to rest a spurious argument advanced in this case by the appellants as a justification for denying parity to the Boston carriers. They urge that the present differentials have remained virtually uncontested for a number of years, and this is apparently taken as in some mysterious manner investing the present relationship with a sacrosanct and immutable quality. (E.g., R. 3853; 314 I.C.C. at 198). Laid bare, the suggestion is that the southern tier carriers have now acquired a prescriptive right in favor of the *status quo—notwithstanding the complete disappearance of* the elements which gave rise to it, namely, the erstwhile *ocean rate differentials*. Such a claim wholly lacks substance even where the circumstances underlying the status quo are unchanged, and the claim would not warrant comment except for its constant and rather insidious repetition. Mr. Justice Cardozo, writing the opinion for the Court in the *Chicago*

case, after expressly observing that the differentials there under consideration "[had been] maintained for many years" (id. at 507), flatly rejected this fact as being of substantial significance, in words which have special relevance here:

> "This brings us to the question whether such disruption and disturbance [of the previous rate structure] may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. . . .
>
> Every change of a rate schedule, either voluntarily or involuntarily, is a disruption *pro tanto* of the rate structure, theretofore prevailing. *Plainly such disruption without more is no sufficient reason for prohibiting a change.*" (Ibid.) (Emphasis supplied in part.)

It is manifest, of course, that the position of the Boston carriers does not stand or fall on any proposition that the necessities of competition inexorably provide an absolute defense to a charge of undue prejudice.[24] No such point need be maintained here. However, their position does rest on a requirement of *recognition* by the Commission of the principles expounded over and over again by this Court, the basic outlines of which admit of no doubt: The Interstate Commerce Act is not designed to eliminate competition between carriers—quite the contrary is true. Consequently, the Commission lacks authority to perpetuate *ad infinitum* a differentially based foreclosure of competition. *Prima facie*, a carrier has a right "within the zone

[24] Nor, of course, does it rest upon a proposition that relative distance must always be totally disregarded.

of reasonableness" to adjust its rates to meet competition, a right which must be accorded significant weight and which (ordinarily, at least) is of controlling significance as a defense to any charge of undue prejudice.

b. The Commission completely ignored the Boston carriers' right to compete.

The importance of the carriers' right voluntarily to adjust their rates in the interest of competition cannot be minimized.[25] Yet the Report on Reconsideration—the Commission's authoritative exposition explaining why the Boston carriers must be denied parity—strangely and inexplicably makes *no* reference to the right of the *Boston* carriers to adjust their rates in the interest of competition. The closest that the Commission comes is its statement that *New York*, as a port, does *not need* 'parity' in order to be competitive. (R. 3854; 314 I.C.C. at 198) Not only is this a far cry from recognition of the basic right of the *Boston carriers* to compete, it casts into sharp relief the irrational basis of the Commission's action: *there can be no warrant for refusing parity to the New York carriers on the assertion that New York, as a port, would thereby become over-competitive while in the same breath denying parity to the Boston carriers without so much as a mention of their right to compete.*

The Commission's error in according no recognition whatsoever to the Boston carriers' right to meet competition not only saps its determination of any vitality but *is clearly at war with the fundamental tenets of the Act.* The Act is not designed to destroy competition among carriers, nor does it give sanction to any attempt perpetually to foreclose Boston carriers from the bulk traffic market

[25] See, generally, Shaffman, 111-B *Interstate Commerce Commission*, 534, *et seq.*

merely because of the Commission's wish to perpetuate the status quo.

c. The authorities relied upon by the Commission afford no justification for disregarding the basic nature of the carriers' right to compete.

When the cases which the Commission cites are examined, the Commission's misconceptions of law are once more starkly exposed. What is apparent at once is that the Commission uncritically relied upon *complaint* cases as being dispositive of the issues before it. (R. 3852-53, 3854; 314 I.C.C. at 196-197; 198) As the District Court correctly points out,

> "... the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1), may be required to change." (R. 4004; 202 F. Supp. at 837)

The limited scope of a complaint proceeding was accurately pinpointed by the District Court, when it said,

> "In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they *should be required* to be changed." (Ibid.) (Emphasis supplied in part.)

The difference between a complaint proceeding (often initiated by a port—whence the term "port" case) and a voluntary carrier proposal (initiated by a railroad—whence the term "railroad" case) is readily apparent, once it is recognized that while carriers have a right to

compete, they have an equally undoubted right not to compete, if that be their choice. Thus, carriers may, if they choose, publish a particular rate in order to compete. They may not, however, *be compelled* to publish that rate, and thus be competitive, if a higher rate is also lawful.[26]

> "Carriers may adjust their charges to meet competition or may decline to do so, as they see fit; and if their policy is to make no special concession to attract traffic, shippers who would have been benefited by the establishment of competitive rates have no lawful grounds of complaint." *IIIB Sharfman, Interstate Commerce Commission*, p. 580.

Judge Magruder clearly spelled out the distinction in *New York Cent. R. R. v. U. S.*, 99 F. Supp. 394, 398, aff'd., 342 U.S. 890, as follows,

> " . . . for the first time, in the instant proceeding, has the Commission been asked to find that a change in the differential *proposed by one of the competing groups of railroads* would be unlawful. Heretofore, the Commission has only had to decide whether to permit the carriers to maintain the differential, or at least not to reduce it . . ." (Emphasis supplied)

and see *Export Grain from Buffalo to New York*, 292 I.C.C. 647, 650.

The pressing point here is that all of the proceedings relied upon by the Commission involved attempts by non-carrier interests to *compel* carriers, against their will, to compete or to compete more aggressively. And all such

[26] The principle that there is a difference between what a carrier could charge to meet competition and what it could be compelled by law to accept is hornbook law and has been recognized many times by this Court. E.g., *Baltimore & O. R. Co. v. United States*, 298 U.S. 348, 379; *Alabama Great Southern R. Co. v. United States*, 340 U.S. 216, 224.

attempts proved futile. Thus, *Maritime Ass'n., Boston Chamber of Commerce* v. *A.T. R.R. Co.*, 95 I.C.C. 539, upon which the Commission apparently places some reliance (R. 3849-50; 314 I.C.C. at 194,195), is a graphic illustration of the proposition. There, Boston port interests were seeking *to compel competition* between the Baltimore and the Boston carriers. The Commission determined that it could not require such competition.[27] *City of Philadelphia* v. *Baltimore & O. R. Co.*, 231 I.C.C. 21, and *State of New Jersey* v. *Baltimore & O. R. Co.*, 245 I.C.C. 581, mentioned by the Commission (R. 3852; 314 I.C.C. at 197), are of precisely the same character.

In the instant case, the northern tier carriers *seek* affirmatively to exercise their undeniable right to compete. They are not resisting pressures, brought against them by others, which would force them to compete, contrary to their wishes. Obviously, decisions in the past which uphold their equally undeniable, but concomitant, right *not to compete* have no bearing upon the instant case. The District Court clearly grasped the distinction; the Commission obviously missed it.

4. The Commission's Subsidiary Finding That, Even With Parity Rates, the Boston Carriers Could Not Effectively Complete For Affected Territory Traffic is Fatal to Its Section 3(1) Finding.

As a further "reason" for its conclusion that the Boston

[27] *Albany Port District Comm.* v. *Ahnapee & W. Ry. Co.*, 219 I.C.C. 151, also relied upon by the Commission (R. 3854; 314 I.C.C. at 198), readily yields to essentially the same analysis. In substance, it raised the question of whether Albany was a port and therefore entitled to port rates. (Id. at 163). After answering both questions in the affirmative, the Commission cancelled Albany's old rates and prescribed new ones. The decision merely prescribed *a* lawful rate; it did not remotely purport to pass upon the range of permissible adjustments which the Albany carriers could take in the interest of engaging in or withdrawing from competition.

carriers' proposed rates should be struck down as violative of Section 3(1), the Commission, in language which, so far as we can tell, is without precedent in the law of undue preference and prejudice, said

> "... the evidence is persuasive that ... so far as Boston, Portland and Albany are concerned, such [rate] *equalization would not materially affect the flow of foreign traffic through any of these ports.*" (R. 3854; 314 I.C.C. at 198) (Emphasis supplied.)

The District Court condemned this finding as fatal to the Commission's Section 3(1) conclusion on two counts, namely, that it precluded a finding of undue prejudice to the southern tier ports and that it also manifested the Commission's complete disregard of the Boston carriers' right to compete. Thus, the Court said,

> "The last reason given in support of its decision is that with respect to the ports of Boston, Albany and Portland, 'equalization would not materially affect the flow of traffic to these ports.' Not only does this statement completely contradict the Commission's ultimate conclusion of undue prejudice to the southern tier ports, but it ignores the plaintiffs' right to attempt to gain some of this traffic for their lines." (R. 4005; 202 F. Supp. at 837-838).

The District Court was plainly right.

Obviously, a finding that, even with lower rates, the Boston carriers would be unable to attract any Affected Territory traffic renders totally absurd an ultimate finding that the proposed lower rates would be *unduly prejudicial* to other ports. It labors the obvious to go much more than simply point out that before there can be *undue* prejudice there must be prejudice in fact—some actual or prospec-

tive injury. The Commission itself has consistently recognized that actual or prospective injury is an indispensable ingredient of undue prejudice, and that a finding of injury is, accordingly, a prerequisite to a valid Section 3 order. *"In the absence of injury rates can not be condemned as unduly prejudicial even where they may appear improper when measured by distance."* *Anson, Gilkey & Hurd Co. v. Great No. Ry.*, 182 I.C.C. 102, 113-114[28] (Emphasis supplied) Yet, here, the Commission unequivocally asserts that no injury will result, because it finds that the Boston carriers *cannot* attract Affected-Territory traffic, even with parity rates, and, notwithstanding this, it finds that the proposed rates would be unduly prejudicial to the southern tier ports. This incredible juxtaposition of findings of no prejudice and undue prejudice has an Alice-in-Wonderland ring to it, and the sharp criticism which it drew from the dissenting Commissioners and the court below was fully warranted.[29]

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[28] See, also, for example, *Bunker Hill & Sullivan M. & C. Co. v. Northern Pac. Ry.*, 129 I.C.C. 242, 246; *Carthage Pulp and Board Company v. Pennsylvania R.R.*, 177 I.C.C. 217, 223; *Scharff Broker Manufacturing Co. v. Atchison, T. & S. F. R. Co.*, 151 I.C.C. 270, 277; *Sand, Gravel and Crushed Stone from Indiana and Illinois Points to Destinations in Illinois*, 181 I.C.C. 373, 393; *Southern Kansas Grain and Grain Products Ass'n. v. Chicago R. I. & Pac. Ry.*, 139 I.C.C. 641, 670; *U. S. Phosphoric Products Corp. v. A. & P. Ry.*, 153 I.C.C. 459, 465.

[29] The Department of Justice charitably, but without justification, urges that this finding of the Commission "properly construed" refers only to the situation in which the Boston carriers would find themselves, if parity rates were *also* approved for New York. The quick answer to this contention is to be found in the following:

a. The plain meaning of the words is otherwise;

b. Commissioners Webb and Tucker, dissenting, understood their colleagues to be saying what the plain meaning of the language indicates.

c. Given other than its plain meaning, the finding would be in conflict with the Commission's order reopening the proceeding specifically to consider "the lawfulness of the proposed rates separately and individually on traffic to and from each of the northern tier ports." (R. 3335-3836; 314 I.C.C. 186, 189)

d. The finding is obviously based upon the Commission's forecast that, whatever the rates to and from New York might be, Bos-

The Commission's insistence that the proposed Boston rates would be unlawful even though they would not materially affect the flow of traffic demonstrates once more that the Commission acted arbitrarily. The Commission forbade the Boston carriers to reduce their rates because it "forecast" that such action would be competitively futile. But, such a "forecast"—even if it were correct—would provide no warrant for denying parity to the Boston carriers. The crucial point is that carriers, within the limits prescribed by law, have a right to try to compete and, accordingly, "to adjust their rates so as to obtain or retain the desired traffic. . . ." *Texas & P. Ry. Co. v. United States*, 289 U.S. 627, 636. The Commission is not authorized to determine what is best for the carriers; it is not charged with "running" the railroads. Congress has given it no such mandates. The Commission, therefore, may *not* justify its decision on the ground that the proposed action would be futile. The *sole* measure of its authority is the prevention of the results proscribed by statute.

The Commission in the past has consistently recognized that forecasts of competitive futility were no reason for denying to carriers their right *to try* to compete. Thus, in *Maritime Ass'n., Boston Chamber of Commerce v. Ann Arbor R. R.*, 95 I.C.C. at 570, 572, it said:

> "one [argument] is that equalization would be of no benefit to Boston, but would instead tend to divert all this traffic to New York . . . [E]ven if it did, we have never regarded the fact that a particular community may reap most of the benefit as a reason for failure to require a just and reasonable charge in rates. Boston is fairly entitled to equal opportunity . . . Conceivably it may not avail itself of this opportunity.

ton's rates would be competitively futile because of other factors unrelated to the rate structure, such as allegedly high port labor costs and allegedly inadequate port facilities and service. (See, e.g., R. 3846-47, 51-52; 314 I.C.C. at 191-92, 956; see, also R. 3850; 314 I.C.C. at 195, last sentence.)

but we are certainly not justified in forecasting a failure in this respect and still less are we justified in using such a forecast as a reason for withholding what we would otherwise accord." (Emphasis supplied.)

And in *Galveston Commercial Ass'n. v. G. H. & S. A. Ry.*, 128 I.C.C. 349, 368, it remarked:

> "Several intervenors take the position that no matter what differentials may be prescribed against New Orleans on said commodities *Galveston never was and never will be a port of any consequence* as to those commodities. But Galveston is entitled to a fair opportunity to secure the foreign and coastwise traffic in such commodities, and we are certainly not justified in predicting a failure on the part of Galveston to take advantage of such opportunity. *Still less would we be justified in using such a forecast as a reason for withholding an order we would otherwise accord.*" (Emphasis supplied.)

These decisions confirm the obvious. A belief that parity rates will not materially affect the flow of traffic is no warrant for prohibiting the Boston carriers from trying to obtain Affected Territory traffic.

POINT III. THE CONTENTION THAT THE COMMISSION IS WITHOUT POWER TO PREVENT THE SOUTHERN TIER CARRIERS FROM RESTORING THE DIFFERENTIALS — THEREBY MOOTING THIS PROCEEDING AND PRECIPITATING A RATE WAR — IS WHOLLY GROUNDLESS.

The southern tier carriers and port interests argue that if the proposed Boston and other northern tier rates be put in to effect, the southern tier carriers, *as a matter of law*, are necessarily entitled to reduce their rates to a level which would reestablish the differential.

This contention, which ignores the fundamental distinction between rates which carriers *may* establish in order to compete and rates which carriers *may not* establish in order to monopolize, has been advanced as a ground for sustaining the Commission's action with respect to the northern tier rates. It is completely devoid of substance, however, and is in the very teeth of Sections 1 and 3 of the Act, as interpreted in the light of the National Transportation Policy and the Policy statement in Section 15(a) of the Act. The Commission's findings demonstrate that the Boston carriers cannot effectively compete for Affected Territory traffic without parity rates, and that parity rates will not prove overcompetitive. Any differential-restoring rates which the southern tier carriers might publish therefore would be *lower than needed* to be competitive with the proposed parity rates of the Boston carriers. Any such differential-restoring rates would be monopolistic and aimed *solely* at keeping their Boston competitors out of Affected Territory and would, accordingly, have to be condemned. The Boston carriers having elected—with all propriety—to be competitive, it devolves upon the Commission—*not merely as a matter of power but as a matter of duty*—in pursuance of the National Transportation Policy, to police the resulting competition and protect—in the national interest—against its deterioration into destructive competition.

The Commission, in the exercise of its statutory powers, has repeatedly recognized that rates which are monopolistic or destructively competitive are unlawful. With respect to the differential-restoring rates which were at issue in *Iron Ore from Eastern Ports to Central Freight Association Points*, 291 I.C.C. 527, 555, it said:

> "A further reduction . . . would result in rates lower than competitively necessary and would fail to bear their just proportion of the total transportation system

> in conformity with the National Transportation Policy, and in a needless sacrifice of carrier revenues."

Export Grain from Buffalo to New York, 292 I.C.C. 647, and *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, 302 I.C.C. 109, are to the same effect. In the latter proceeding, the Pennsylvania Railroad had published reduced rates from Philadelphia to offset competitive rates published by the New York Central. The Commission found that the New York Central rates were competitive and lawful and, accordingly, ordered the reduced rates of the Pennsylvania cancelled on the ground that they would be destructively competitive, saying:

> "The proposed reduction from Philadelphia is disapproved for the reason that it would result in a rate war and in needless dissipation of greatly needed carrier revenue, and thus constitute an unfair and *destructive competitive practice* in contravention of the national transportation policy." (Id. at 117). (Emphasis supplied.)

These holdings follow past precedent, wherein the Commission has consistently condemned rates which would bar other carriers from an opportunity to compete effectively at reasonable rate levels. See, for example, *Shoe Dressing in Official Territory*, 246 I.C.C. 579, 582; *Coke from Southern Points to Southern Ports*, 204 I.C.C. 767, 773; and compare *Jefferson Island Salt Mining Co. v. United States*, 6 F. 2d 315, 318; *Atlanta and Saint Andrews Bay Ry. v. United States*, 104 F. Supp. 193, 199; and *Scandrett v. United States*, 32 F. Supp. 995, 998, aff'd., 312 U.S. 667.

The Commission's suggestion (Reg. R. 3806; 311 I.C.C. at 741) and the appellants' arguments to this Court assert that recognition of the right of the Boston carriers to re-

duce their rates would automatically *compel* a sanctioning of lower southern rates, leading to rate warfare, is simply absurd. As this Court said in a similar set of circumstances:

> "The danger is illusory. The whole situation is subject to the power of the Commission which may keep the changes within bounds." *United States v. Chicago, M. & P. S. R. Co.*, 294 U.S. 499, 509.

POINT IV. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMMISSION'S ORDER WITH RESPECT TO THE BOSTON RATES SHOULD BE SET ASIDE AND PERMANENTLY ENJOINED, RATHER THAN BE REMANDED TO THE COMMISSION.

A. Settled Principles Governing The Relationship Between Courts And Administrative Agencies Demonstrate That Recommittal Will Not Be Ordered Where The Record Discloses That It Would Be Essentially Wasteful Or Grossly Inequitable.

In defining the proper relationship between the Federal courts and administrative agencies, this Court has developed a consistent body of doctrine embracing principles of fundamental importance with respect to the division of functions between courts and administrative agencies. And, of course, it has been made very clear that where Congress has committed determinations to an agency, courts must carefully refrain from trespassing upon the administrative domain, and judicial review gives to the judges neither justification nor excuse to decide what Congress has committed elsewhere for decision. E.g., *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 20-21. Accordingly, no one questions that, if the administrative agency's errors

of law have resulted in undue abbreviation of the administrative process, the reviewing court's task is at an end when an agency's "error of law is laid bare" (id. at 20), and recommittal is appropriate, since the agency should be given the opportunity to apply the correct legal standards to the issue at hand. (Ibid.)

Recommittal—once error is exposed—is not, however, an inexorable and unalterable command. The very principles which call for recommittal in particular cases act *also* to preclude recommittal in others. Thus, for example, recommittal is not ordered where the process would be essentially "academic" and wasteful, as where, under any view of the law and the evidence, the result could be but one way. See, e.g., *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 47-48; *Diminich* v. *Esperdy*, 299 F.2d 244, 248, cert. den., 369 U.S. 844. Limitations upon recommittal also inhere in the fact that courts do not review administration action garbed in a statutory strait-jacket, but rather as courts of equity.

> "The jurisdiction to review . . . is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial review." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374.[30]

[30] The fundamental reason that a court necessarily reviews administrative action with the broad powers of a court of equity is discussed by Professor Jaffe:

> "But the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent

There are, of course, any number of decisions expressly holding that the federal courts sit with broad equity powers in reviewing the decisions of the Commission. See, e.g., *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 239; *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157-158; cf. *United States* v. *Morgan*, 307 U.S. 183, 191.

It is apparent, therefore, that recommittal will not be ordered where it would be inequitable to do so. Considerations basic to our legal system preclude the idea that the participants in the administrative process must inevitably run again and again the gauntlet of the administrative process every time the agency fails to perform completely its task. The ancient maxim that justice delayed is justice denied is not without application to the economic regulatory agencies. Thus, the Administrative Procedure Act, 5 U.S.C. § 1001, et seq., which clearly applies to the Commission,[31] specifically recognizes that administrative action "shall proceed with reasonable dispatch" (id. § 1005(a)), a right which is judicially enforceable, *Deering Milliken, Inc.* v. *Johnston*, 4 Cir., 295 F.2d 856, 860-864.

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mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law: the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law', and the ultimate guarantees associated with the Constitution. Thus in the review of administrative actions a court may appeal to criteria of validity which have no specific locus in the 'words.'" Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 274-275.

[31] *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 192.

B. *The Record In This Case Fully Discloses That Recommittal On The Issue Of Lawfulness Of The Boston Rates Would Be Wasteful And Inequitable*

1. Recommittal Would Be Wasteful and Accomplish Nothing But Delay

The record on this appeal demonstrates clearly that further Commission consideration of the proposed Boston rates would be wasteful and productive of nothing but further delay since this record indicates nothing which even suggests that the proposed Boston rates are unlawful.

a. The Section 3(1) issue.

So far as concerns the issue of Section 3(1), remand of the Boston rates to the Commission would, we submit, serve no useful purpose. The facts are not disputed. The Commission in its Original Report, pointed out that competitive considerations are the touchstone of port rate adjustments, that distance disregard is the rule, rather than the exception, in such adjustments, and that the distance disregard inherent in the Boston and other northern tier carrier rates was much less than commonly prevails elsewhere in parity or near-parity adjustments. The Commission also found, so far as Boston is concerned, that, even with parity, Boston will have difficulty competing, and no one has ever suggested either that Boston has no competitive necessity for parity or that, if accorded parity, it would be over-competitive.

On these facts, when viewed in the light of the singularly clear legal principles which the Commission itself reaffirmed in its Original Report, we think it clear that the District Court properly concluded that the result on remand could be but one way. Accordingly, it properly exercised its equity

jurisdiction not to remand, and that determination should not be disturbed here.

b. The Section 1(5) issue.

So far as concerns the issue of Section 1(5), remand of the Boston rates to the Commission in order that it may make a specific finding of justness and reasonableness cannot be justified. The Commission's technical omission to find the Boston rates just and reasonable is no warrant for the delay and consequent injury to the Boston carriers and port interests which would result from remand, particularly where neither of the Commission's reports indicates any basis whatsoever for believing these rates to be unreasonable.

So far as concerns Section 1(5) the Commission had before it:

(1) The evidence, consisting of the northern carriers' *prima facie* justification of their rates on the basis of revenues, and the southern carriers' cost evidence in rebuttal, including an analysis by the Pennsylvania and Baltimore & Ohio Railroads of their own New York harbor costs; and

(2) A recommendation by the Hearing Examiner that the Commission find the northern rates, as a group, not shown to be just and reasonable. (R. 3729)

So far as concerns the evidence, the Commission noted, in its Original Report, the absence of any material controversy as to the so-called inland-terminal and line-haul costs, saying:

> "The parties are in substantial agreement as to the correctness of data for these two elements of cost." (R. 3793; 311 I.C.C. at 731)

It then proceeded to identify the areas of disagreement as those principally affecting *New York* harbor costs, saying, first,

> "The principal area of controversy concerns the port terminal costs, especially those for the marine operations at New York . . ." (R. 3793; 311 I.C.C. at 732)

and

> "The peculiar methods used in handling most of the import-export traffic at New York have been described. Typical elements of these costs include the expense of switching between trainyards and the float bridges or lighterage piers, station service, float-bridge service, and water operations." (R. 3794; 311 I.C.C. at 732)

and still further,

> "Another area of disagreement is the degree in which the New York port costs, particularly those incident to the respondents' marine operations in the harbor, are variable with changes in traffic volume." (R. 3795; 311 I.C.C. at 733)

The Commission considered these areas of disagreement and sharply criticized the *southern tier-carriers'* showing of New York costs, pointing out that they were limited to general cargo traffic, which is lightered, and omitted costs and revenues on bulk commodities which are handled by much less expensive direct transfer from pier to ship. Thus, the Commission said:

> "However, as *the protestants' showing* is limited to cost for general cargo handled by the predominant or normal method at New York, no revenues were shown and no costs determined for bulk commodities handled by direct transfer, such as grain and ore . . ." (R. 3792; 311 I.C.C. at 731) (Emphasis supplied.)

The Commission then proceeded to use these southern-tier carrier costs which it had just criticized as unrealistically high, restate them into out-of-pocket costs at the "traditional estimated level" of 80 percent of fully distributed costs, make certain other adjustments (minor in nature) and then to find that

> "... application of the resulting costs to the New York traffic indicates that the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs. ..."[32] (R. 3797; 311 I.C.C. at 734)

The Commission went on, moreover, to repeat its misgivings concerning the *fairness to the northern-tier carriers* of premising such cost findings upon only one type of traffic—general cargo—which is handled generally by only one method and that the most expensive, namely, lighterage. On the basis of this analysis of the evidence and its own conclusion therefrom that even if *average costs at New*

[32] As dissenting Commissioner Webb pointed out,

"Included in the estimated out-of-pocket costs is a return of 4 percent on investment after Federal income taxes. None of the respondent railroads serving the port of New York had an average rate of return on investment of 4 percent for the years 1946-1957, inclusive. The record shows that for 1957 respondent Lehigh Valley had a return of 0.44 percent and respondent New Haven a return of 0.08 percent. Annual reports filed with the Interstate Commerce Commission show that respondent New York Central's rate of return on investment in 1958 was only 0.61 percent and that the New Haven failed to make any return at all on its investment in 1958 and 1959.

"It is clear, therefore, that the proposed rates which are found to 'equal or exceed by a small margin' the estimated out-of-pocket costs (which include a 4 percent return on investment after Federal income taxes) would not burden domestic traffic. Rather, the record shows that the proposed rates would make a far greater contribution to the total transportation burden than the rates applicable to other traffic." (R. 3813; 311 I.C.C. at 746-747)

York were as great as claimed by the southern carriers, the New York rates would produce revenues equal to or in excess of out-of-pocket costs, including 4% return on investment, the Commission disavowed and rejected—by refusing to adopt—its Examiner's recommended finding that the northern tier carriers' rates, as a group, had not been shown to be just and reasonable. Plainly, the Commission had no other choice.

The Commission's language is admittedly inept, and the southern tier interests have taken advantage of this fact to completely distort its meaning to this Court. It is perfectly clear from a reading of the entire Original Report, however, that when the Commission said (after noting that, on the basis of the southern tier carriers' cost studies, it had concluded that the New York rates were compensatory):

> "'However, a presentation of costs adequate to determine whether the proposed rates would be reasonably compensatory should embrace all types of traffic which those rates are expected to attract, and should reflect the costs of the specific methods by which they would be handled.'" (R. 3797; 311 I.C.C. at 734)

the Commission was reiterating *precisely* what it earlier had said *critically* with respect to those same southern tier showings of New York costs, namely,

> "as the protestants' showing is limited to cost for general cargo handled by the predominant or normal method at New York, no revenues were shown and no costs determined for bulk commodities handled by direct transfer, such as grain and ore. . . ." (R. 3792; 311 I.C.C. at 731)

Both of these statements plainly say that cost studies based on both types of traffic (general cargo and bulk) and all methods of handling cargo (including direct transfer between ship and pier and not merely Marine service handling) would obviously be more favorable to the New York carriers than was the southern tier carriers' cost showing.[33]

Be that as it may, however, it is clear beyond cavil that this record makes clear that the Commission *could not* properly have held concern as to the reasonableness of the Boston rates. *The Boston carriers* made a *prima facie showing of adequate revenues*, and there were no replies to that showing which the Commission regarded as even worth mentioning in either of its Reports. Moreover, the Commission's finding that revenues from the New York rates would equal or exceed out-of-pocket costs (even using the southern carriers' higher than average cost data) when taken with the Commission's own clear findings of the relationship between the Boston and New York carriers' costs make it abundantly clear that Boston's rates would be substantially more remunerative to the Boston carriers than New York's rates would be to the New York carriers, that the Boston rates *ipso facto* would be substantially above the level required to cover out-of-pocket costs, including 4% return on investments, and accordingly, would be just and reasonable.

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[33] Dissenting Commissioner Webb said precisely the same thing, but more articulately, in criticism of the southern tier carriers' cost study, "This study did not include traffic handled by the least expensive means, that is, traffic transferred direct between car and ship and not handled in lighterage, car float, or trucking in lieu of lighterage service. In September 1956, respondent New York Central transferred 30 percent of its traffic at New York direct from car to ship. If the cost evidence had included 'heavy-moving bulk commodities' transferred directly between ship and shore and which the respondents hope to attract by rate equalization, it is reasonable to assume that the showing of compensativity would be enhanced rather than diminished." (R. 3812; 311 I.C.C. at 746)

The Commission's findings show beyond question that the Boston carriers incur substantially lower over-all costs than the New York carriers, because their much lower port terminal costs far more than compensate for the modest advantage in line-haul costs which New York enjoys, due to its closer proximity to Affected Territory. Thus, the Commission's findings make clear that the Boston carriers do not incur any of the unusual harbor costs associated with lighterage, trucking in lieu of lighterage and car floatage services which the New York carriers perform. These are admittedly costly services,[34] and their costs far exceed the additional costs which the Boston carriers incur by reason of their somewhat longer line-hauls.[35]

All of the foregoing findings and conclusions are contained in the Original Report. In its Report on Reconsideration, the Commission, although purporting to consider the northern tier carriers' rates on an individual port basis, rather than as a group, confined itself to Section 3(1) issues and made no reference whatsoever to Section 1(5). Had the Commission adverted to the Section 1(5) issue on reconsideration and dealt with the rates on an individual port basis, its own Original Report makes clear that it could not properly have refused to find the Boston rates just and reasonable.[36] Indeed, it is plain that the reason

[34] The Commission's findings at R. 3797-98; 311 I.C.C. at 735, show that the fully-distributed cost of lighterage and trucking in lieu of lighterage at New York during a test period was $4.99 per ton. If, as the Appellee New York carriers contend, approximately 60% of this cost represents out-of-pocket expense, the cost attributable to lighterage (or trucking in lieu thereof), of the contents of a typical 27-1/2 ton car would be approximately $82.50. If 80% of fully-distributed cost be considered out-of-pocket cost, the corresponding figure would be approximately $103.

[35] The Commission found at R. 3793; 311 I.C.C. 731-732 that Boston has a line-haul cost disadvantage in relation to New York of only $33.07 per car in costs which vary with the number of cars handled, and $1.18 per ton in costs which vary with the number of tons handled. This would represent, on a typical 27-1/2 ton box car, a total cost disadvantage of only $65.52.

[36] The contention advanced to this Court by the southern tier car-

that the Commission did *not* address itself to the question of the reasonableness of the Boston rates in the Report on Reconsideration is precisely because it realized there could be no serious issue with respect to them.

In these circumstances, we submit, the District Court was clearly right in not remanding the Boston rates.

c. Section 4 issues.

There remains to be answered the one further "red-herring" argument which the southern tier carriers and port interests have advanced to this Court in an attempt further to forestall the effectiveness of Boston's *proposed* parity rates. That contention is that, if the Boston rates, and the Boston rates only, are permitted to become effective, as they would if this Court were to affirm the District Court's action only with respect to the proposed Boston rates, Boston's approved parity rates would be lower than the *present* rates to and from the ports of New York, Albany and Philadelphia *over some routes*, i.e., the routings *through* the ports of Albany, New York and Philadelphia and *in such instances* might be violative of the long-and-short-haul provisions of Section 4 of the Act. This, the southern tier carrier and port interests speciously argue, calls for remand of the entire proceeding, including the Boston rates portion thereof, to the Commission.[37]

riers—that when the New Haven Railroad's analysis of Boston costs is compared with the revenues which the Boston carriers would receive on grain and other bulk commodities, operating losses are shown (Brief for Appellants, page 44)—must be completely disregarded. Such a comparison is meaningless, because the costs used are average costs far in excess of those incurred in the predominantly-mechanized port handling of bulk-commodities. The southern tier carriers knew the contention to be specious and did not even advance it before the Commission.

[37] The southern tier carrier and port interests do not suggest—although the Department of Justice appears to—that remand is necessary because the northern tier carriers' original Fourth Section Application No. 32204 remains undisposed of. This suggestion is obviously with-

Of all the spurious contentions which have been advanced by the southern tier carrier and port interests in this proceeding, this is probably the most absurd. The Court will note that the language quoted from the Commission's Report on Reconsideration compares Boston's *proposed* parity rates with the *present* rates from Albany, New York and Philadelphia, all of which are differentially higher than Baltimore's present rates. The Commission then points out that, if Boston's rates were the only rates permitted to be reduced to the Baltimore level, such rates would over certain routings *through* the ports of Albany, New York and Philadelphia involve departures from the standards of Section 4.

The Commission made this statement only in passing, and was careful to limit its comment to "over some routes". The Commission was well aware (as are appellants) that, via many other and important routings available to the Boston carriers, there are no Fourth Section problems as to these or any other ports and that the Boston rates could properly become effective over such other routes immediately without Fourth Section relief, except as to the non-competitive inland points covered by the northern carriers' original Fourth Section application.

Another answer to the southern carriers' and port interests' contention is that, when the Boston rates become legally effective over such routes as do not involve Fourth Section departures, the Boston carriers will be in a position to seek such Fourth Section relief as they think appropri-

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out merit. It is common practice, dictated by necessity in proceedings of this type, for carriers to await final action on the substantive aspects of their rate proposals before submitting the specific Fourth Section Application data required to be filed. Thus, in their initial brief to the Examiner, the northern tier carriers stated,

> "It is contemplated that an amendment to the present Fourth Section Application No. 32204, giving the usual detailed analyses of the Fourth Section departures, will be filed upon receipt of the Commission's decision on the broad question of port equalization."

ate, which, presumably, would be readily forthcoming. E.g. *Texas & Pac. Ry. Co.* v. *United States*, 289 U.S. 627, 637. If New York's and Albany's parity rates are approved, and the Philadelphia carriers publish rates on the Baltimore level, no relief will be needed. If Albany's are the only other parity rates which are approved, the Boston carriers might well decide not to publish their parity rates over the circuitous routes which pass through Philadelphia and New York.

In other words, the alleged Fourth Section "problem", far from being one of substance, involves only clerical and administrative problems for the Boston carriers' traffic departments. This Court can and should resolve those "problems" by affirming the District Court's action relative to the Boston rates, subject only to such further permissions, if any, as the Boston carriers may choose to seek pursuant to Section 4 of the Act.

2. Recommittal Would Be Grossly Inequitable To The Boston Carriers And Port Interests And Is Entirely Unnecessary.

Recommittal of the Boston rates for further Commission action would unconscionably delay and interfere with the right of the Boston carriers to make their tariffs effective. This matter has been before the Commission and the courts for *nearly seven years*—since 1956. Recommittal can only portend interminable further delay, before the Commission and in still further proceedings before the courts—all of which, of course, is the aim of the southern tier carriers and port interests.

The injustice which recommittal would work becomes even more apparent when it is recalled that the Commission has *already* twice considered this matter. The first time, it erroneously focused its attention solely on the New York

rates, treating the northern carriers' proposal as a group reduction, and viewing the northern tier ports other than New York as of no competitive importance. The United States confessed error, and the Commission undertook reconsideration on its own motion. The second time around, the Commission presented the parties with a decision which (1) the District Court found to be erroneous in law and to lack the rational basis necessary to uphold it, and (2) the findings of which, in the language of the brief filed in this Court by the United States,

> "lump together the relevant and irrelevant and do not provide a rational basis for its conclusion . . ."

There comes a time when embattled litigants are entitled to be protected from delay and the studied arbitrariness of an administrative agency. As pointed out in the preceding section of this brief, there is nothing in this case which can properly be said to call for further Commission consideration, and the Boston carriers have quite obviously reached the point at which they are entitled to protection against further protracted delay.

It should be pointed out, in conclusion, that in balancing the equities of recommittal or not, the Court is not required to reach any final or binding determination as to whether the Boston rates are lawful. This proceeding is *only* an appeal from an order of the Commission made pursuant to its investigation and suspension powers under Section 15(7) of the Act. If recommittal be denied, and the decree of the lower court be confirmed, the Commission is *not* thereby foreclosed from considering the matter further. Complaint proceedings may be instituted under Section 13(1) to test further the validity of the rates. And, under Section 13(2), the Commission itself may, on its own motion, fully inquire into the validity of these rates. This ready availability of

other channels for further investigation into the validity of the rates, coupled with the manifest injustice which would inhere in compelling the Boston carriers and port interests to run the lengthy course of the administrative and judicial processes for yet a third time argues compellingly, we submit, for affirmance of the lower court's judgment with respect to the Boston rates. (pp. 72-74)

Conclusion

For the reasons stated, the decree of the District Court should be affirmed insofar as it enjoins the Commission's order with respect to the proposed Boston rates.

Respectfully submitted,

ROBERT G. BLEAKNEY, JR.
150 Causeway Street
Boston 14, Massachusetts
Counsel for the Railroad Appellees

HENRY E. FOLEY
10 Post Office Square
Boston 9, Massachusetts
Counsel for Massachusetts Port Authority

Of Counsel
NEAL HOLLAND
JAMES W. GRADY
THOMAS P. HACKETT

Of Counsel
CLARENCE I. PETERSON
HENRY P. MONAGHAN
FOLEY, HOAG & ELIOT

March 7, 1963

Appendix

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901 and 1001) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without injust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * * *

Sec. 1 * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every un-

just and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 4(1) It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the immediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge

ss for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

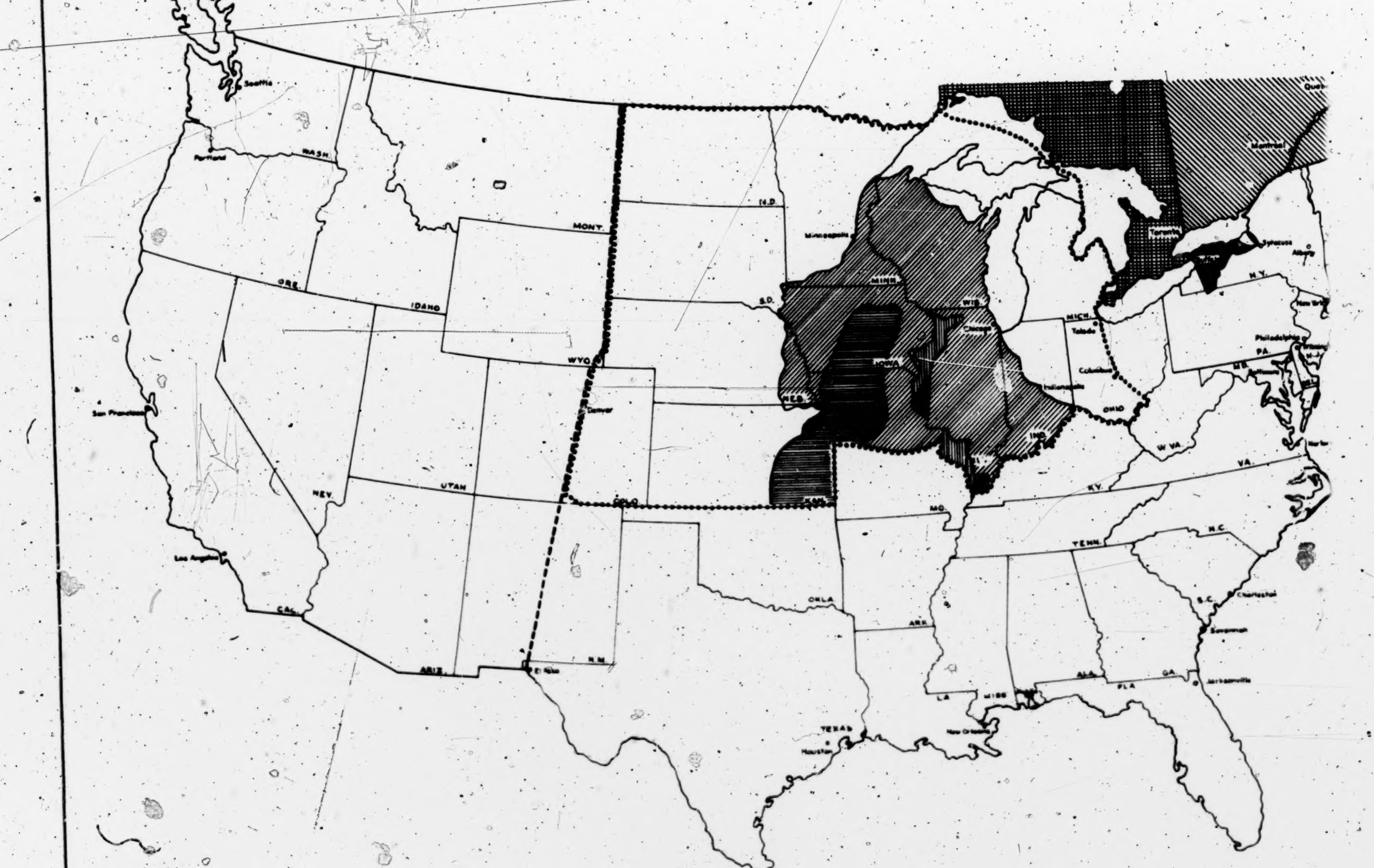
* * * *

Sec. 15 * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge,

the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates

or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Sec. 15a * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.


Seattle
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UTAH
COLO.
KANS.
San Francisco
Los Angeles
CAL.
ARIZ.
N.M.
OKLA.
ARK.
TEXAS
Houston
LA.
MISS.
ALA.
GA.
FLA.
MINN.
IOWA
WIS.
Chicago
MICH.
Toledo
Columbus
OHIO
IND.
W. VA.
VA.
KY.
TENN.
N.C.
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Charleston
Syracuse
Albany
N.Y.
Philadelphia
PA.
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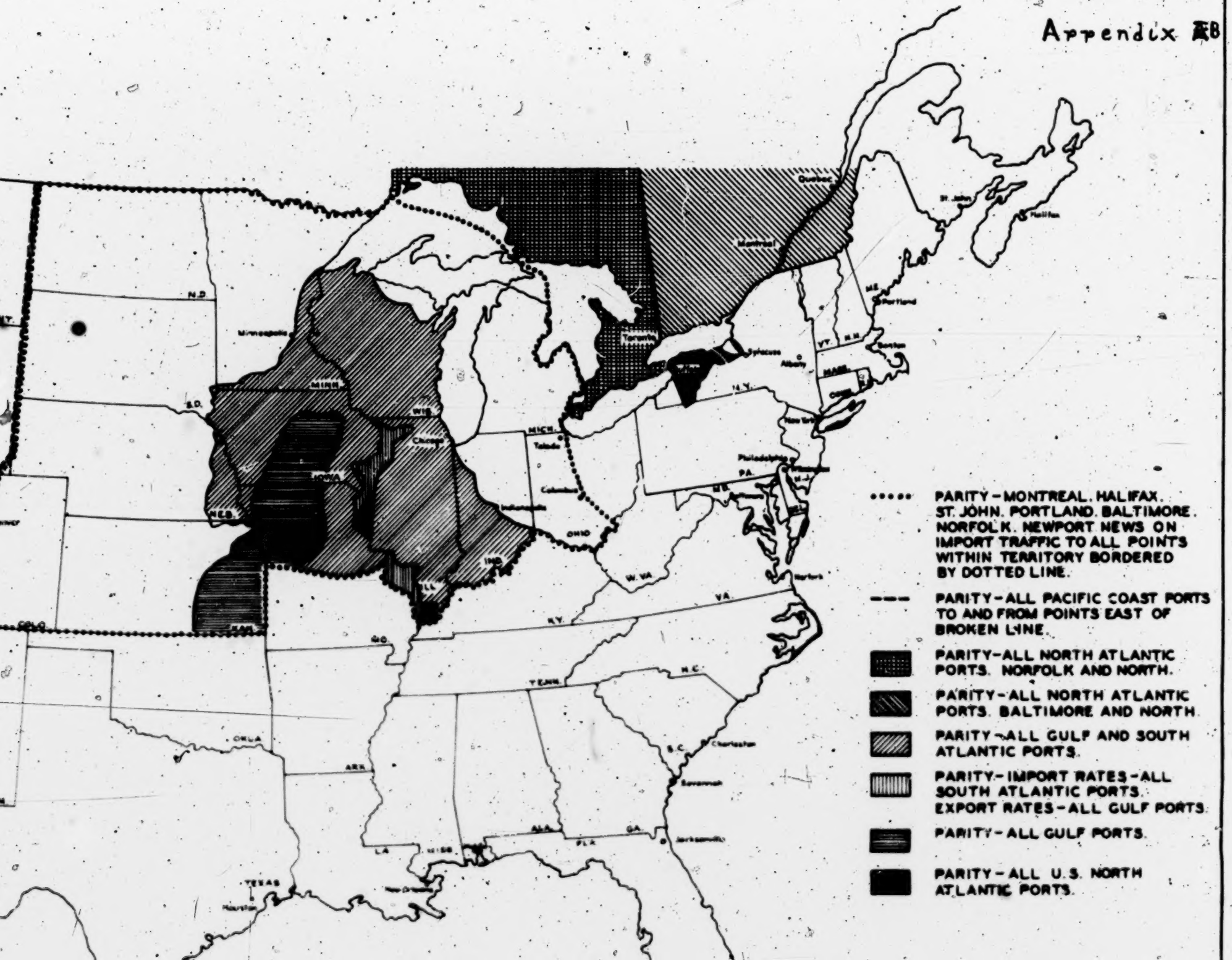
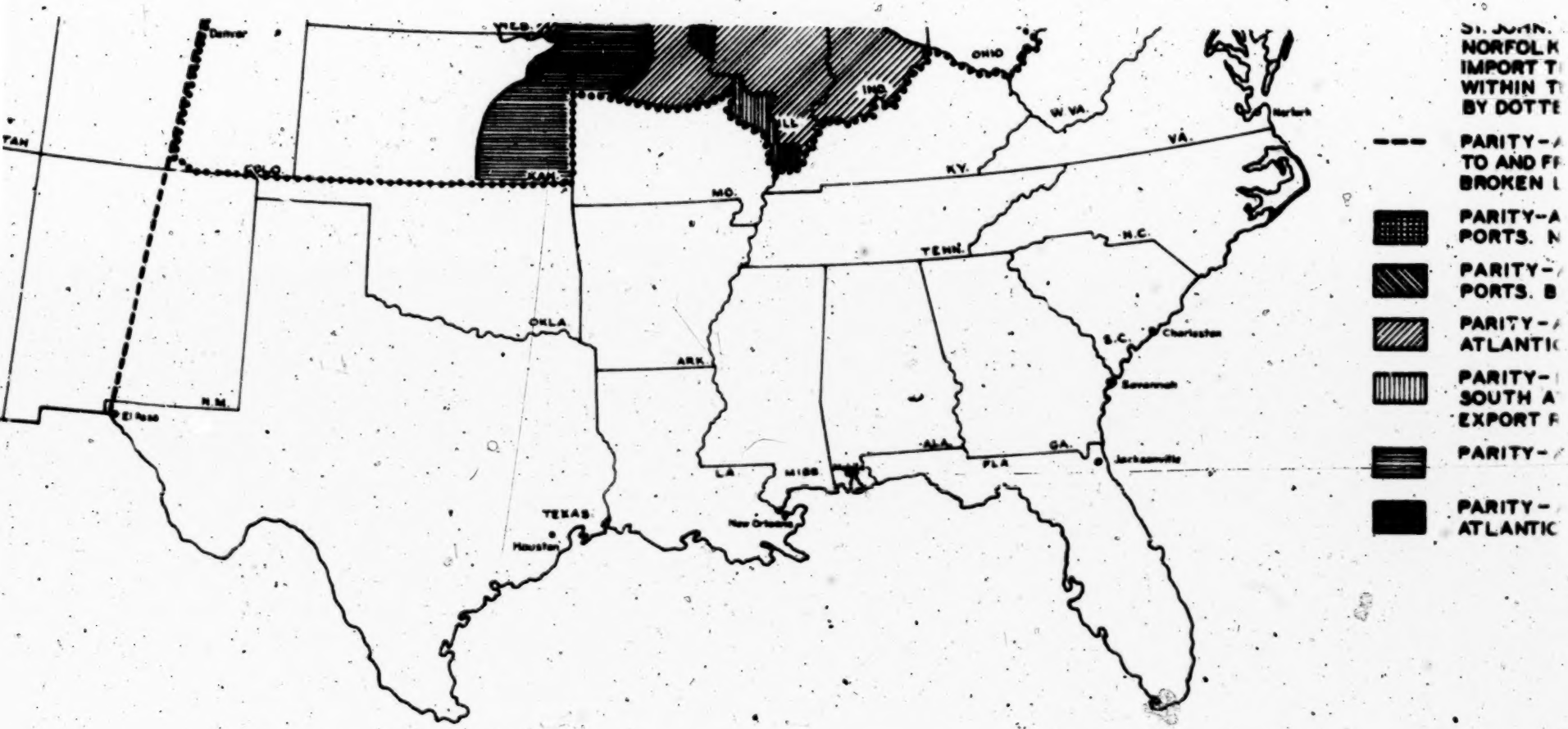
WITNESS
EXHIBIT 29

Appendix B





MAP ILLUSTRATING EXTENT OF

UNITED STATES AND CANADIAN

INTERIOR TERRITORIES ENJOYING PARITY OF IMPORT - EXPORT RAILROAD RATES VIA ATLANTIC, GULF AND PACIFIC COASTAL PORTS